No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, Deceased, and RUTH E. SUCKOW,
Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, et al.,
Appellees.

Brief for Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, James M. Gerstley, Frank M. Jenifer, Bank of America National Trust & Savings Association as Executor of the Last Will and Testament of Clarence M. Rasor, Stauffer Chemical Company, and West End Chemical Company.

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This brief is filed on behalf of all but one of the appellees.[1]

[1]The caption on the transcript and appellants' brief lists 17 appellees. This is erroneous. Seventeen parties were named as defendants, but 6 were never served, and 2 were dismissed for lack of venue, no appeal being taken from the dismissal. There are only 9 appellees.

The plaintiffs will hereafter be referred to as appellants and the defendants as appellees. Appellant Suckow Borax Mines Consolidated, Inc. will be referred to as the Suckow company, and John K. Suckow, the testator of appellant Tobeler, will be referred to as Suckow.[2] Appellees Pacific Coast Borax Company and United States Borax Company are subsidiaries of Borax Consolidated, Ltd., and the group or its members will be referred to by any of these names, as is done in the complaint.

STATEMENT OF THE CASE

A. Nature of the Case.

This action was commenced on September 11, 1947. It is a treble damage suit brought under the antitrust laws (Clayton Act) by private parties, involving the borax industry and based on the claim that appellants were driven out of business many years ago. Upon motion to dismiss and motion for summary judgment, the action was dismissed, with an opinion now reported in 81 F. Supp. 301.

B. The Case is Controlled by the Decision of This Court in Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F.2d 569.

The action is controlled by the recent decision of this Court in *Burnham Chemical Company v. Borax Consolidated, Ltd.*, et al., 170 F.2d 569, certiorari denied by the United States Supreme Court on March 7, 1949 (336 U.S. 924).[3]

Both actions were instituted by the same attorney. Counsel who appeared before this Court on behalf of the Burnham company are counsel for appellants here. Most of the defendants

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[2]In some of the quoted material the Suckow company is referred to as SBM, and appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company as BCL, PCB and USB.

[3]This Court denied rehearing on December 6, 1948. The Supreme Court denied a rehearing on April 18, 1949 (336 U.S. 955).

here were defendants there.[4] Plaintiff claimed there, as appellants did here, that it was driven out of business by appellees. The identical conspiracy is alleged. The complaints in the two cases are almost identical.[5]

Upon motion to dismiss and a motion for summary judgment, the District Court dismissed the Burnham action as barred by the statute of limitations. This Court affirmed.

Similar motions were filed here[6] and were extensively argued below, orally and in writing, while the *Burnham* case was pending in this Court. Appellants' arguments below were identical with those then being presented to this Court by the same counsel on behalf of the Burnham company. The District Court therefore held the case under submission until this Court should decide the *Burnham* case.[7]

The decision of this Court in the *Burnham* case having been rendered on October 27, 1948, the decision below followed on November 22, 1948.

In view of these facts, it is remarkable that appellants nowhere even mention this Court's decision in the *Burnham* case.

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[4]The only additional defendants here are Stauffer Chemical Company, West End Chemical Company and two officers and the estate of one employee of the defendant Pacific Coast Borax Company.

[5]The first two paragraphs are the same, the next several describe the plaintiffs, and paragraphs 7-78, inclusive, of the complaint in the present action (R. 6-40) are identical with paragraphs 4-71, inclusive, of the Burnham complaint except for the addition of paragraphs describing additional defendants here. Both complaints then follow with a section entitled "As to the Plaintiff[s]."

[6]The motions of the Borax Consolidated group of defendants appear at R. 452, et seq. The other defendants filed similar motions. After the complaint was amended, it was stipulated on April 7, 1948, that the motions should be deemed addressed to the complaint as amended (R. 645).

[7]Thus, at the conclusion of the oral argument the court said (R. 667): "I think with the consent of everybody with relation to this litigation it would be well to wait until we have the final determination of the Circuit Court in the Burnham case. Wouldn't that be helpful?"

For aught their brief discloses, there never was any such decision. Yet the arguments made in that brief are identical with those presented to this Court and the Supreme Court in the *Burnham* case and there rejected as unsound.

C. The Proceedings Below.

Appellees' motions (R. 452, 446, 461) were of two types. First, they asked dismissal for reasons appearing *on the face of the complaint itself,* these reasons being as follows:

1. The action is barred on its face by the statute of limitations; and

2. No claim on which relief may be granted is stated. Here appellees made three independent points, viz.:

   (a) release, shown by the complaint;
   (b) conclusiveness of judgments, shown by the complaint;
   (c) failure of allegations relative to damages.[8]

Second, appellees' motions, with the support of certain affidavits, asked for summary judgment (R. 455) under Rule 56, R.C.P.

In view of appellants' criticism of judgments based on affidavits, it will be noted that *the sole purpose of the affidavits was to bring before the court undisputed documentary material.*[9] The procedure followed was the same as that in the *Burnham* case, where similar documents, establishing similar facts, were the foundation of the judgment of dismissal.

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[8]We also made the point, noted briefly at p. 32, infra, that there was a total failure of allegations as to three of the plaintiffs.

[9]There were three affidavits named in the motion (R. 457): (1) Affidavit of Judge Ashburn of the Superior Court, Los Angeles (R. 83), the sole purpose of which was to authenticate an affidavit made in 1930 by John K. Suckow, the testator of the plaintiff Tobeler and at that time president of the plaintiff Suckow Borax Mines Consolidated, Inc. (R. 85-100); (2) an affidavit of Albert H. Bargion, court reporter in the United States District Court, Southern District of California (R. 100), the sole purpose of which was to authenticate certain proceedings in 1932 in that court; (3) affidavit of Moses Lasky (R. 106-129), the sole purpose of which was to bring before the court some 15 original or certified documents (R. 130-440).

The documents are of three types:

1. Written assertions, charges and accusations made by appellants against appellees in past litigation.

2. Court reporter's transcripts of similar accusations and charges made in open court.

3. Releases by appellants to appellees of all past claims, given after continued assertion of violations of the antitrust laws.

Many of the documents were official records, and certified copies of these were brought before the court. In the case of the other documents, photostatic copies were authenticated by affidavit (R. 106-129) to which they were attached as exhibits (R. 130-440), and the originals were then produced in open court. (Cf. R. 128, 129; R. 646.)

This documentary material was not susceptible of any dispute and was not disputed. It represented immutable facts.

D. Comparison of Issues Here with Those in Burnham Case.

Appellants' case is far weaker than Burnham's case. This action is barred by the statute of limitations for the same reasons as Burnham's case and for others as well. Moreover, appellants have no case for reasons not involved in the *Burnham* case. Here all claims asserted were long ago released. In addition, appellants are seeking to go behind final judgments and retry numerous old lawsuits, since most of the alleged damage for which they seek compensation resulted from the fact that in past litigation in the United States District Court for the Southern District of California judgments, long since final, were entered against some of the appellants in favor of some of the appellees.

E. The Allegations of the Complaint.

The complaint is lengthy and discursive, but its essence is that appellees drove the Suckow company and Suckow out of the borax business by forcing them to cease operating their borax properties and to give up those properties.

The complaint falls into two divisions in respect of time, (a) allegations relating to what occurred up to and including a general settlement and release in the fall of 1934, and (b) allegations of what occurred from 1934 to and including a general settlement and release at the end of 1942.

1. UP TO THE FALL OF 1934.

The complaint alleges (R. 49, et seq.) that in 1926 Suckow discovered a deposit of tincal, a valuable type of borate ore, on property of which he and appellee Borax Consolidated, Ltd. was each the owner of an undivided one-half interest (R. 48, 49).[10] Thereupon, it is alleged, appellee and its associates began to harass Suckow (R. 50), and in order to do so the appellee Borax Consolidated, Ltd., as owner of the undivided half interest in the borate property, began a lawsuit in Kern County in 1927, seeking an accounting and an adjudication of the Suckow's rights to the ore; this suit was dismissed in 1930 (R. 50, 51).

Appellant Suckow company was formed in 1929 and Suckow then transferred to it all his undivided interest in the property on which the borate deposit was located as well as adjoining land on which his plant was situated (R. 51).

It then is alleged that subsequently in 1929 appellees entered into a conspiracy and a plan to destroy the business of Suckow and of the Suckow company (R. 52, para. 82; R. 80, para. 69 as amended).

Certain acts are alleged to have been performed pursuant to this conspiracy: Appellees entered upon a course of conduct to bring about the financial and business destruction of Suckow

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[10]While the complaint alleges that Suckow discovered certain borate deposits in 1913 (R. 42) and sold interests therein to certain appellants from 1913 to 1925 (R. 42-49), those properties play no further part in the complaint, and it is elsewhere alleged that that type of borate became economically unimportant in 1926 when kernite, a far more valuable type of borate, was discovered (R. 19, para. 41).

and the Suckow company (R. 52, 53). In March 1930 Borax Consolidated, Ltd. began an equity suit in the United States District Court for the Southern District of California against Suckow and the Suckow company to enjoin them from operating and mining the jointly owned properties and for an accounting and damages (R. 53, para. 83(b)). In June 1931 Pacific Coast Borax Company and other appellees instituted bankruptcy proceedings in the Southern District of California against the Suckow company (R. 55, para. 83(c)).

The Suckow company was adjudicated a bankrupt in 1933 (R. 58, para. 83(c)), the Suckow borax properties passed to the trustee in bankruptcy, and in April 1934 the bankrupt's interest in the jointly owned property and in the adjacent acreage on which it had its plant was leased by the trustee to Pacific Coast Borax Company, the owner of the other half interest, for five years (R. 59, para. 83(d)).

It is also alleged that Pacific Coast Borax Company filed a patent infringement suit against the Suckow company which was tried in 1932 (R. 60, para. 83(f)). The various lawsuits between appellants and appellees are then summed up in paragraph 83(g) (R. 61-65).

Thus in 1934, thirteen years before this action was filed, the Suckow company ceased to operate or mine any borate properties or to be in the borax business.

This fact is distinctly alleged. For example, it is alleged (R. 65, para. 84):

> "That due to said bankruptcy proceedings and to each, all and every of said other activities of said defendants, or some of them, as herein set forth, and all pursuant to and in furtherance of said 'General Conspiracy' referred to hereinabove, said Suckow and said Suckow Company were destroyed financially and left without means or opportunity further to engage in the said borax business or any of its activities in any form whatsoever, and as a result thereof and by reason thereof,

said Suckow was forced and compelled eventually to make and enter into an *agreement of so-called settlement* with defendant Pacific Coast Borax Company, and which agreement was *dated the 18th day of August, 1934* * * *."

It is alleged that under the agreement of August 18, 1934, Pacific Coast Borax Company was to obtain an even more favorable lease from the trustee, and the Suckow company would voluntarily join as lessor. Certain property was to be conveyed outright by the Suckow company to appellees United States Borax Company and Borax Consolidated, Ltd.[11] Furthermore, the Suckows were to dismiss all actions against Pacific Coast Borax Company, Borax Consolidated, Ltd. and United States Borax Company and were to

"*release all possible claims* against said PCB, BCL and USB; in turn it was further provided that said Pacific Coast Borax Company should dismiss or cause to be dismissed all said actions against said Suckow or said Suckow company, and pay said Suckow $150,000 in a certain manner and upon certain conditions set forth in said agreement. * * *" (R. 66, para. 84.)

The new lease was to be for ten years beginning September 17, 1934 (R. 67). Appellants were to dismiss all appeals from all judgments and orders previously entered against them in favor of appellees (R. 62, 63, 64, 66).

This agreement of August 18, 1934, it is alleged, was fully performed (R. 68, top).

Thus by the end of 1934 Suckow and the Suckow company were completely out of the borax business, and long and diverse litigation with certain appellees was settled by the giving of releases and dismissals of appeals from all adverse judgments.

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[11]It is also alleged that other appellants were to give quitclaims, although it is not alleged that any appellant but the Suckow company had any interest to convey.

2. 1934 TO 1942.

In 1938, while the lease to Pacific Coast Borax Company still had six years to go, the bankruptcy ended, and the Suckow company's assets were returned to it, including the reversion under the lease (R. 69, para. 85).

Only three overt acts are alleged to have occurred after 1934, as follows:

1. That under the lease Pacific Coast Borax Company operated the mine in the jointly owned property "in an unminerlike, inefficient and incompetent manner," so that in 1937, ten years before this suit was filed, a cave-in occurred, and that the lessee continued to mine the property in a careless manner and caused a further cave-in (Compl. para. 87, R. 70; para. 88(d), R. 72).

2. That the lessee used the shafts and tunnels on the property, an undivided half of which it owned and an undivided half of which it leased, to remove ore from adjacent property wholly owned by it, in alleged violation of the terms of the lease (para. 88(b), R. 71).

3. That in December 1942 the Suckow company became discouraged and sold its reversionary interest in the leased property to appellee Borax Consolidated, Ltd. (para. 88(e), R. 73).

When the sale was made, the Suckow company gave another complete release of all claims (R. 74, para. 88(e)). All this was consummated, it is alleged, in December 1942 (R. 75, para. 88(e)). The Suckow company was paid $350,000 as consideration.

It will be noted that in 1942 and for eight years previously neither Suckow nor the Suckow company had any borax business. The complaint alleges that one of the reasons the Suckow company sold its interest in the leased property was (R. 74, para. 88):

> "the fact that all of the former customers of said SBM in England and Holland had been taken over by defendants and

many of the refineries on the European Continent using raw or calcined ore had discontinued their operations for lack of such ore, and the further fact that all of the former European markets of said SBM had been lost through the activities of defendants, or some of them. * * *."

The European market was the only market which, according to the complaint, the Suckow company had ever managed to enter. The Suckow company, shortly after its formation and its acquisition of Suckow's borate properties, made a contract in 1929 with a Dutch refiner called Gembo (R. 51, para. 81). It was through this contract that, according to the complaint, "an outlet [for its ore] was afforded to said Suckow company" (R. 52, para. 81), but, as it is alleged, the Gembo connection was terminated in 1934 (R. 64, para. 83, subd. (g)7).

Thus the complaint affirmatively shows that after 1934 appellants were not in the borax business, that any damage sustained in being driven out of that business had occurred no later than 1934, that in 1942 the only appellant that had any interest was the Suckow company, and that its interest was merely that of a lessor of an undivided one-half of property leased to the owner of the other half under a lease still having two years to run.

In selling this interest, the Suckow company received $350,000. There are no allegations that the $350,000 was not the full and fair value of what was sold.

F. The Facts as Shown by the Uncontradicted Documents. In Numerous Lawsuits Pending Years Ago Appellants Accused Appellees of the Alleged Violations of the Anti-Trust Laws Constituting the Basis of the Present Suit.

In the *Burnham* case this Court quoted with approval the statement of the District Judge, made when granting the summary judgment of dismissal, as follows (170 F.2d 569, 573, fn. 4):

"All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff * * * that its business had been damaged by acts of the defendants in violation of the Anti-trust Laws. * * * Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact."

With a mere change of names these remarks apply with even greater force to the present case.

Here the assertions from the mouths of the appellants and their predecessors in interest were made repeatedly in the most solemn form in judicial proceedings in numerous lawsuits pending years ago between them and some of the appellees. In these lawsuits the present appellants made against the present appellees the very accusations of violations of the antitrust laws which constitute the foundation of their present complaint.

We set up the facts here in chronological order, to let them speak for themselves. Since the documents are very long, it may assist the Court for us to extract and quote pertinent passages, even at the risk of appearing to do so at some length.

1. JANUARY 13, 1930. RELATIVE TO THE CASE OF BORAX CONSOLIDATED, LTD. V. JOHN K. SUCKOW, NO. 20694, SUPERIOR COURT, KERN COUNTY.

In paragraph 80 of the complaint (R. 50) reference is made to the case of *Borax Consolidated, Ltd. v. John K. Suckow,* No. 20694, Superior Court, Kern County, it being alleged that the action was instituted to harass Suckow.

In January 1930, Borax Consolidated, Ltd. applied to the Superior Court in Los Angeles for a subpoena to take Suckow's deposition in this Kern County action (R. 83). On January 13, 1930 Suckow executed and presented an affidavit in opposition to the application. That affidavit is in the record at R. 85-96.

In that affidavit, executed *18 years ago, Suckow asserted many of the charges made in the present complaint.* For example, he said [R. 86, and paras. 13-15, R. 93-96]:

> "* * * said Borax Consolidated, Ltd., and its subsidiary corporations [United States Borax Company and Pacific Coast Borax Company] are now, and for many years past have been, familiarly known in the business of producing and distributing borax and the products of borax as the 'Borax Trust.'
>
> * * * * *
>
> "* * * that affiant is informed and believes, and therefore alleges *that through an agreement of the large producers of borax throughout the world, production was curtailed and competition was eliminated, with the direct consequence that the price of refined borax* rose from Forty Dollars in or about 1905, to One Hundred Fifty-five ($155.00) Dollars a ton in or about 1921; that * * * between the years 1905 and the years 1920 and 1921, the supply of crude borax throughout the world was practically controlled by said Borax Consolidated, Ltd., and its subsidiaries commonly referred to as aforesaid as the 'Borax Trust'; that * * * through competition between the said Borax Trust and other producers of borax and particularly through the competition of *American Potash & Chemical Company* [one of appellees here], the price of refined borax decreased from approximately One Hundred Fifty-five Dollars a ton in 1921 to Forty ($40.00) Dollars a ton in December of this year; *that affiant is informed and believes, and therefore alleges that said Borax Consolidated, Ltd., and its said subsidiaries commonly called as aforesaid the 'Borax Trust,' is again endeavoring to control and curtail production and eliminate competition by agreement and otherwise; that affiant was approached in December of this year by C. M. Rasor, Engineer and Agent of the Pacific Coast Borax*

Company, and in charge of the affairs of said company in this county, and requested by said C. M. Rasor to curtail production of ore; * * * that affiant declined to enter into *such arrangement with said Pacific Coast Borax Company to curtail said production and to eliminate competition of the said Suckow Borax Mines Consolidated, Inc.,* and said Borax Consolidated, Ltd., and its said subsidiary Pacific Coast Borax Company; that *subsequently to the month of December, 1929, the price of refined borax rose from approximately Forty Dollars a ton to between Fifty and Sixty Dollars a ton; that affiant is informed and believes, and therefore alleges that said increase in the said price of refined borax is directly due to some agreement between producers of crude borax and said Borax Consolidated, Ltd., and its said subsidiaries known as aforesaid as the 'Borax Trust.'*

"(14) That an inspection of the contract between said Suckow Borax Mines Consolidated, Inc., and said N. V. Chemische Fabriek 'Gembo' is desired by said Borax Consolidated, Ltd., *pursuant to its plan and purpose as aforesaid of curtailing the production of crude borax throughout the world and eliminating competition among the producers of said crude borax and thereby raising the price of said crude and refined borax to the consumer;* * * * that an inspection of said contract is desired by said Borax Consolidated, Ltd., * * * *in order that affiant and said Suckow Borax Mines Consolidated, Inc., may be harassed in the sale and distribution of its share of said ore produced from said property first hereinabove particularly described.*

"(15) That an inspection of said contract * * * will afford said Borax Consolidated, Ltd., and its said subsidiaries, known as aforesaid as the 'Borax Trust,' *the opportunity desired by said Borax Consolidated, Ltd., to eliminate affiant and said Suckow Borax Mines Consolidated, Inc., as a competitor in the production and distribution of crude and refined borax, and of unfairly harassing and annoying affiant and said Suckow Borax Mines Consolidated, Inc.,* in carrying out contracts entered into between said Suckow Borax Mines Consolidated, Inc. and its customers."

2. JULY 14, 1930: IN BORAX CONSOLIDATED, LTD. V. SUCKOW BORAX MINES CONSOLIDATED, INC., JOHN K. SUCKOW, ET AL., NO. C-107-M,[12] U. S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

The above action is referred to in the complaint in the present case in paragraph 83, subdivision (b) and (g) (R. 53, 61), as one of the suits brought by appellees against appellants as part of the conspiracy to drive them out of business.

On July 14, 1930 Suckow and the Suckow company filed their answer, verified under oath by Suckow. A certified copy is in the record at R. 130-155.

In that answer Suckow and the Suckow company charged:

"Allege that there have been at all times since the work commenced for developing said mine controversies between said Plaintiff and the said John K. Suckow and said corporation defendant relative to the proper conduct and the operation of mining the said ore and conducting the said mining operations; * * *. That these defendants allege that they are informed and believe and therefore state that said *Plaintiff does not desire to have any ore produced from said mine on said lands and premises in Plaintiff's Bill herein described by reason of the fact that said Plaintiff owns and operates other borax properties in which neither of these defendants nor any of them have any interest and does not desire and will not permit if it can prevent the same, any ore to be produced from said property in said Bill described or said mine in competition with ore produced by Plaintiff from its other properties.* That the said Plaintiff has at all times discouraged the development of said mine and has at all times indicated its desire that said mine be shut down and that no ore be produced therefrom. * * * [R. 135].

* * * * *

"Allege that these defendants are informed and believe and therefore state that the said refusal to assent thereto *was pursuant to a plan and purpose of the said Plaintiff to pre-*

[12]Sometimes referred to as C-107-H, the case having come before both Judge McCormick and Judge Hollzer.

vent the said Defendant John K. Suckow and said Suckow Borax Mines Consolidated, Inc. as his successor in interest, from producing any ore from the said mine and to prevent such ore from coming in competition in the market with ore produced by said Plaintiff and its affiliated companies from other properties and thereby creating a monopoly in the production and sale of ore of similar character, to wit: borax, in the said Plaintiff." [R. 149]

3. DECEMBER 8, 1932: SAME SUIT, C-107-M.

On December 8, 1932 Suckow and the Suckow company filed an "Answer to Bill in Equity as Amended." A copy appears at R. 156-166.

In the *First Affirmative Defense* Suckow and the Suckow company made exactly the same accusations against defendants of violation of the Sherman Act as they do in the present case. We respectfully ask the court to compare the assertions made by Suckow and the Suckow company in 1932 with the allegations appearing in the present complaint from R. 49, line 27, to R. 64, line 12. The sham nature of the excuses now made for delay in suing becomes at once apparent. We quote from this 1932 document (R. 156-158):

"Plaintiff herein, Borax Consolidated, Ltd., United States Borax Company, and Pacific Coast Borax Company, and each of them (hereinafter referred to collectively as the *'Borax Trust'*), are corporations * * *. The activities of said Borax Trust, as above set forth, are world wide in their scope and extent and involve interstate commerce and trade with foreign nations.

"2. *It is and was at all times herein mentioned a part of the fixed design and general policy of said Borax Trust to dominate and control both the extent and amount of production of borate products, and as well the price or prices at which the same should or might be sold in the markets of the world, thereby to secure a monopoly with respect to the production and marketing thereof, wholly for its own gain and*

to the detriment of its competitors and of the general public. Pursuant to said fixed design and general policy said Borax Trust has at all times herein mentioned established, settled and fixed, and does now by agreement and understanding between its members aforesaid establish, settle and fix, the prices of said borate products from time to time in such manner as to preclude and to prevent free and unrestricted competition in the production and marketing of the products aforesaid. Said members of said Trust have likewise at all times herein mentioned combined, confederated, conspired and agreed, and do now combine, confederate, conspire and agree, among themselves, each with the other and in restraint of free trade and competition, to pool, combine and unite their several interests and facilities in connection with the production, marketing and sale of said borate products in such a manner as to affect, control and dominate the price or prices thereof to the consumer and to the manufacturing world in general, and thereby to stifle competition with regard to such production, marketing and sale thereof."

The answer then alleged the ownership by Suckow and the Suckow company since 1922 of borate properties and the discovery in 1927 of a very valuable deposit of ore and continued (R. 159-165):

"By reason of the foregoing facts and *in view of the policy and practices of the Borax Trust, as hereinabove set forth, and with a view to obtaining a monopoly upon and sole control of the valuable tincal deposit aforesaid, the members of said Borax Trust entered into the plan and conspiracy hereinafter set forth.*

"5. Defendants are informed and believe, and hence allege that in or about the month of September, 1927, and immediately following the discovery by defendant John K. Suckow of the tincal deposit hereinabove referred to, the *members of said Borax Trust, * * * did combine, confederate, conspire and agree among themselves, each with the other, to obtain at any cost and by any means the exclusive possession, control and domination of said tincal deposit*

** * *. It was a part of said combination and conspiracy, and said members of said Borax Trust did then and there agree in furtherance thereof to harass and to annoy defendant John K. Suckow and/or his successor or successors in interest in and to said real property* (hereinafter referred to as defendants Suckow), and each of them, *with vexatious, protracted and costly litigation, said conspirators and each of them then and there well knowing that the financial condition of defendants Suckow was insufficient to withstand the cost of such litigation and that the resources of said Borax Trust were limitless. It was likewise a part of said combination and conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, to hamper and hinder the activities of defendants Suckow in working the tincal deposit aforesaid through the medium of injunction suits* directed toward the cessation of mining operations of these defendants upon said property, and likewise directed toward the prevention of the fulfillment by said defendants of contracts for the sale of said borate ore theretofore entered into by them, and *likewise through the medium of applications for the appointment of a receiver or receivers to take over the management and possession of the property in question, * * *. It was likewise a part of said combination and conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, to hamper and hinder the activities of defendants Suckow in working the tincal deposit aforesaid through the medium of procuring the institution of a bankruptcy proceeding against said defendants, thereby ultimately to buy up said property at a trustee's sale and at a grossly disproportionate price in the event the bankruptcy of said defendants should be adjudicated in such proceeding. It was likewise a part of said combination and conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, each with the other, that the members of said trust should cause to be filed in the bankruptcy proceeding aforesaid an unjust and excessive claim against the alleged bankrupt therein, thereby to obtain an unlawful preference over the general creditors of said defendants Suckow. It was likewise a part of said combination and*

*conspiracy, and said members of said Borax Trust did also then and there agree in furtherance thereof, each with the other, that the members of said Borax Trust should, in any and all litigation to be instituted by any of its members as aforesaid against the defendants Suckow, * * * endeavor to establish the value at the mine mouth of ore produced from the above mentioned property at * * * $22.50 per ton, thereby to secure a large and excessive judgment * * * against said defendants, while at the same time aiding and abetting the petitioning creditors in any bankruptcy proceeding that might be filed against said defendants Suckow in establishing such ore value to be at or in the neighborhood of $2.50 per ton, thereby to aid in procuring an adjudication of bankruptcy as against said defendants,* together with * * * the opportunity to buy in the property aforesaid at a trustee's sale in bankruptcy at a cost of little or nothing, in comparison with the true value of said property. * * *

"6. *Pursuant to and in furtherance of said combination and conspiracy:*

"6.1. Plaintiff herein did on or about September 21, 1927, institute an action in the Superior Court of the State of California, in and for the County of Kern, * * * wherein plaintiff sought an accounting * * * and * * * to enjoin said defendant from further operations. * * *

"6.2. Thereupon plaintiff herein did on or about March 29, 1930, institute the present suit, praying in its bill of complaint herein *inter alia* that an accounting be had and that defendants and each of them be enjoined from operating the property hereinabove described * * *.

"6.3. Said Borax Trust * * * did on or about June 30, 1931, procure and cause the filing of an involuntary petition in bankruptcy against defendant Suckow Corporation by certain creditors thereof, all for the purpose of harassing and annoying said defendant, * * * ultimately buying up said property * * * at a gross undervaluation * * *.

"6.4. During the trial of the present suit * * * plaintiff herein endeavored to establish * * * the value at the mine mouth of ore produced from the above mentioned property as being at or in the neighborhood of $22.50 per ton, and

said plaintiff * * * sought, and now seeks, to obtain a judgment * * * against these defendants * * * upon the basis of the aforesaid tonnage value.

"6.5. Defendants and each of them are informed and believe, and hence allege that subsequent to June 30, 1931, *said Borax Trust and its respective members did aid and abet the petitioning creditors in that certain bankruptcy proceeding* * * * in establishing the ore value at * * * $2.50 per ton, * * * with the intent and design * * * to aid in procuring an adjudication of bankruptcy * * * and thereafter to file a claim in said proceeding * * * predicated upon a finding of value in this present suit, upon the basis of $22.50 per ton, * * *. *It was also then and there the intention of the members of said trust to force said defendant corporation out of business through the use of the means and methods aforesaid, and ultimately to purchase the property hereinabove described at forced sale in bankruptcy at a sum far below its true value.*

"7. *Defendants allege that the aforesaid activities of said Borax Trust have resulted in their being crippled financially, and that only the interposition of a court of equity will prevent the consummation by said Borax Trust of the purposes of said conspiracy and combination and the successful attainment by said Trust of the aims, purposes and designs thereof, to-wit: The elimination of these defendants and each of them as competitors in the production and marketing of borate products;* the maintenance by said Borax Trust of their policy in fixing, controlling and dominating prices through the elimination of a competitor as aforesaid, and the obtaining of the real property hereinabove described, together with the valuable tincal deposit therein contained, at a price utterly disproportionate to its true value, all of which was duly foreseen and contemplated by the members of said Borax Trust at the inception of said combination and conspiracy."

4. DECEMBER 26, 1932: SAME SUIT, C-107-M.

On December 26, 1932 in resisting a motion to strike the above answer the attorneys for Suckow and the Suckow company

made the following charges in open court before Judge Hollzer (R. 101, 102)[13]:

"Mr. Tuller: * * * We set up by allegations—appropriate allegations, beginning on page 33 of this answer that *this whole thing is a part of a plan to throttle competition and create a monopoly in the United States and subject the people of the United States to the evils of monopoly in the dealings in borax. In other words, that this is a part of the plan to bring about an unlawful and illegal result; and that this court is being used to aid in accomplishing that unlawful purpose.* * * * this whole plan and purpose, including the prosecution of the bankruptcy proceedings is a part of a plan to bring about an unlawful monopoly in restraint of trade by destroying or preventing of at least potential competition in dealing in borax in this country that comes from the ownership of this property by the Suckow Borax Company, one of the defendants. The matter is set up fully. We have shown the situation of the borax industry in this country, the combination that we allege, upon information and belief, exists and the purpose that we allege, upon information and belief, exists. If it is true, *it constitutes an absolutely illegal proceeding in direct violation, not only of the policy of the law, but the statutes of the United States;*"

5. JULY 13, 1933: SAME SUIT, C-107-M.

During the trial of the above suit on July 13, 1933, counsel for the Suckows made these accusations (R. 104)[14]:

"Mr. Buren: In that connection, your Honor, I want to call your Honor's attention to what may not have appeared yet on the surface of this case. In my opinion, this is a great deal more than an ordinary lawsuit; there is a great deal more involved in it than an ordinary lawsuit. * * * Your Honor is facing here a grave responsibility which may result in determining the price for future generations of Americans

[13]Set forth in the affidavit of Alfred H. Bargion. Mr. Bargion was the court reporter who reported the argument (R. 100).

[14]Also set forth in the affidavit of the court reporter, Mr. Bargion, who reported the trial (R. 103).

and other citizens of the world may have to pay for their borax. *The plaintiff in this case is a huge borax octopus, with its head in the City of London, England, and its tentacles extending all over the world, wherever there is a bit of borax to be found* and have practically all the borax in the world. *This suit* was not filed with the possibility of collecting a few thousand dollars that more or less they might be able to collect from this defendant, but it *is for the purpose of either forcing him to sell out or to put him out of business so they can control all the borax there is in the world.* And we want an opportunity to go into that and show your Honor all we can, at least, as to what is at the bottom of this case."

Counsel who made those statements was Mr. Buren. Mr. Buren was also the Secretary of the Suckow company. (See R. 222, 570, 587.) And he is one of appellants' attorneys in the present case (R. 661; so appears on appellants' opening brief).

6. NOVEMBER 15, 1933 TO NOVEMBER 22, 1933: IN HEARINGS IN LOS ANGELES BEFORE U. S. SENATE COMMITTEE INVESTIGATING BANKRUPTCY PROCEEDINGS IN U. S. COURTS.

In November 1933 a Senate Investigating Committee held hearings in Los Angeles and investigated the Suckow bankruptcy, among others. A certified copy of the transcript as published by the United States Senate is in the record (R. 170-238).

Mr. William Neblett was counsel for the Committee, and two months later, as we shall show, became attorney for Suckow and the Suckow company in its litigation with Borax Consolidated, Ltd. and Pacific Coast Borax Company. Mr. Frank Buren was present throughout the whole of these proceedings and heard everything that was said and charged about the present appellees (so admitted, R. 658, 659). He also testified at these proceedings of 1933 (R. 223). He was the Secretary of the Suckow company and its attorney (R. 222).

Mr. Laugharn, trustee in bankruptcy of the Suckow company (R. 173, 174) stated that Borax Consolidated, Ltd. and Pacific

Coast Borax Company were a monopoly (R. 183). Senator Hebert read a statement by Thomas McManus, first receiver in bankruptcy of the Suckow company, that Pacific Coast Borax Company had launched a campaign of persecution against Suckow and dragged him through bankruptcy (R. 183-186), and that (R. 186):

> "As an indication of the length to which the Pacific Co. was prepared to go in its determination to throttle and kill all competition, the author of this report * * * was informed by Mr. Jenifer, vice-president and general manager of the Pacific Co., that this concern had offered Dr. Suckow an independent income for life on the condition that he would not attempt to develop the borax lands in which he owns a one-half undivided interest."

Thomas McManus, under questioning by Mr. Neblett, testified that he told Judge Hollzer (R. 202, 203)

> *"that I was fully convinced that this petition did not originate in good faith, that I thought it was a conspiracy on the part of people to get control of the company, and that I had grave suspicions as to the Borax Consolidated's interest in the matter."*

He testified that another competitor, Western Borax Co. (R. 206, 207)

> "told me of the terrible difficulties they were having continuously with the Pacific Coast Borax Co., and *they told me that there was no question in their mind that this thing was—this receivership and bankruptcy action — was promoted by the Pacific Coast Borax Co."*

He dwelt upon other facts and circumstances which in the present complaint appellants allege they did not discover until recently (R. 207). He also testified (R. 218):

> "Colonel Neblett. * * * Let me ask you one question: *From your study of this case, what is your opinion as to the purpose of all of these proceedings? Do we understand your*

testimony to be that the purpose of these proceedings which have been brought against the Suckow Borax Co., numerous in character, were with the intent on the part of the persons prosecuting them to maintain this monopoly in the English concern, known as the Borax Consolidated, Ltd.?

"Mr. McManus. I think that was true, and I think it was the design on the part of certain people to buy this property at a bankruptcy proceeding at practically little or nothing.

"Colonel Neblett. *Well, are you positive now from your investigation that the purpose of all of these proceedings was to maintain the monopoly in the English concern? Is that right?*

"Mr. McManus. *I am very much of that opinion.*"

Mr. Buren, the secretary of the Suckow company and its attorney, testified (R. 223) and dwelt on the fact that in the suit of Borax Consolidated, Ltd. against Suckow and the Suckow company, No. C-107-M, ore wrongfully taken by Suckow on property in which plaintiff and defendants were tenants in common was found to be worth over $20.00 per ton so as to warrant a large judgment against Suckow and the Suckow company, while the same ore was found in the Suckow company's bankruptcy proceedings to be worth only $2.50 per ton, as a result of which the Suckow company was found to be insolvent (R. 225-229). This is a matter of which appellants make much in the present complaint (R. 56-58).

Mr. Buren then testified (R. 228):

"Colonel Neblett. *In your opinion, what is the reason for the prosecution of these various and sundry suits which have been prosecuted against the Suckow Borax Co.?*

"Mr. Buren. *Well, my opinion is for one purpose only: that is to eliminate a competitor and to acquire a monopoly in the borax business.*

"Colonel Neblett. *And to eliminate a competitor in favor of what person or corporation?*

"Mr. Buren. *Well, what we call the 'Borax Trust'.*"

Mr. William Neblett, the Committee's counsel, then summed up his case thus (R. 235-237):

"Colonel Neblett. Well, it has been testified to here on yesterday * * * by three witnesses. And by those three witnesses, certificates were produced which tend to show that the Suckow Borax Co. was a half owner of a very valuable deposit of borax in the Cramer district in Kern County.

* * * * *

"* * * That the Pacific Coast Borax Co., a subsidiary of the London borax company owns a half interest with the Suckow Borax Co. in this valuable borax deposit. This borax deposit is the most valuable deposit in the world. * * * Borax Consolidated of England has a world monopoly on that supply of borax. It seems that all of the mines elsewhere have been abandoned because of the cheapness of operation and higher grade of the product in the Cramer district. The Suckow Borax Co. was operating this mine in which the Pacific Borax Co. own a half interest and the Pacific Borax Co. was operating a mine in the near vicinity, and the *Suckow Borax Co. became a serious competitor of the monopoly; whereupon the Pacific Coast Borax began suit.*

"The Borax Consolidated began suit against the Suckow Co. and then this involuntary petition in bankruptcy was filed. * * *

"The testimony indicates that all of this litigation and including the involuntary petition in bankruptcy was brought for the purpose of enforcing a monopoly and maintaining a monopoly in the British concern and that the petitioning creditors, represented by this witness, were a part of the scheme or conspiracy to maintain that monopoly by putting the Suckow Borax Co. out of business. I propose to show by this witness, if he will answer my questions, that the suit which he maintained has some ancestry which leads back to the British monopoly."

7. DECEMBER 28, 1933, IN ABOVE-MENTIONED SUIT NO. C-107-M, BORAX CONSOLIDATED, LTD. V. SUCKOW.

On December 28, 1933, Mr. Buren, Secretary of the Suckow company and Suckow's attorney, filed "Defendant, John K.

Suckow's Brief on Retrial of the Cause." A certified copy appears at R. 167-169. In that brief he made these accusations (R. 167):

> "As the writer of this brief stated to the Court in the closing moments of this second trial of the cause, there is more back of this case (and that also goes for the bankruptcy case) than has yet come to light. And we have no hesitancy now in predicting that if these two cases ever become the subject of an investigation by some tribunal not bound by the technical rules of procedure which hamper the courts, there will be found to be a more intimate connection between the two cases than could possibly have been even suspected by the Court, and that *it will also be found that the bankruptcy case was the result of a conspiracy, pure and simple, to throw an otherwise entirely solvent concern into bankruptcy.*"

These statements were made about one month after Buren's participation in the proceedings before the Senate Committee.

8. JANUARY 12, 1934: SAME SUIT, C-107-M.

Two months after Mr. Neblett's handling of the Senate Investigation and asserting the charges against the present appellees, he became attorney for Suckow and the Suckow company in Case C-107-M. A certified copy of the association of attorneys appears in the record at R. 239.

9. JANUARY 25, 1934: SAME SUIT, C-107-M.

Within two weeks of becoming Suckow's attorney Mr. Neblett filed in said case No. C-107-M a "Memorandum of John K. Suckow on the Findings of Fact and Conclusions of Law Proposed by Plaintiff." A certified copy appears in the record at R. 241-247. Judgment had been ordered by Judge Hollzer in favor of Borax Consolidated, Ltd., and John Suckow was objecting to the proposed findings. In this memorandum Suckow and his attorney made these accusations against Borax Consolidated, Ltd.:

"The finding on Page 4, lines 31 to Page 5, line 5 and Page 5, line 14 state that plaintiff offered to pay half the development costs. Said finding is misleading and untrue in the way the language ordinarily would be understood. The truth of the matter is that the alleged offer was to pay half the costs of developing the property upon the condition that Suckow give them joint possession of the shaft *and enter into a price fixing and price marketing combination (probably a violation of the Anti-Trust Law) with them.* * * * [R. 241-242]

"* * * *The evidence shows plaintiff was trying to put Suckow out of business, together with its other competitors;* * * * [R. 242]

* * * * *

"* * * In addition the evidence is overwhelming that plaintiff at no time desired that this described property produce Borax. * * * Plaintiff offered to pay his share only on condition that Suckow let plaintiff control the marketing of said ore. * * * [R. 243]

* * * * *

"The allegation on Page 7 of the complaint—that Suckow refused to enter into a price fixing and marketing agreement with his competitor—should be explicitly found. Plaintiff's offer was a suggestion that Suckow violate the Anti-Trust Law. All its offers and demands were conditioned upon Suckow joining it in such a violation. These facts as alleged should be explicitly found. [R. 244]

"* * * This shows, without further evidence that plaintiff's offer to pay half the expense was in fact at all times conditioned upon its unlawful demand that Suckow allow it to control the marketing of said ore. [R. 244-245]

* * * * *

"24. *The allegation on Page 26 of the answer—that plaintiff's actions herein are part of a conspiracy to drive Suckow, his competitor, out of business—should be explicitly found.* This is important because it shows plaintiff comes into Court with unclean hands." [R. 245]

10. JANUARY 30, 1934: SAME CASE, NO. C-107-H.

On January 30, 1934, in this same litigation, Mr. Neblett, on behalf of the Suckows, wrote a letter to Judge Hollzer of the United States District Court, Southern District of California, asserting (R. 591):

> "It must now be apparent to the court that this action and the other litigation fostered and prosecuted by the plaintiff is an attempt to maintain the monopoly which Borax Consolidated has in the borax industry. The destruction of the one competitor of the plaintiff is the only objective of this action.
>
> "True, the plaintiff through its counsel and directing genius, as any good strategist would do, has carefully screened from the court its real intentions, hoping to take, by this ruse, the Suckow ground and hold it fortified by the judgment of this court. * * *
>
> * * * * * * *
>
> "The plaintiff [Borax Consolidated, Ltd.] is a monopoly of the worst sort. It confesses in its complaint that the great majority of its business is interstate and international commerce. Its acts violate the provisions of Sections 1 to 7 of the Sherman Anti-Trust Law, U.S.C.A. Title 15, page 4, et seq. The plaintiff should be condemned for the ingenious scheme it is using of invoking the aid of the court to frustrate the laws of the nation and to sustain its unlawful monopoly." (R. 593).

11. JANUARY 27, 1934: IN THE MATTER OF SUCKOW BORAX MINES CONSOLIDATED, INC., A CORPORATION, BANKRUPT, NO. 16938-H, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

The case mentioned in the caption is the bankruptcy case referred to in the complaint. On January 27, 1934 the Suckow company, represented by Mr. Neblett and its Secretary, Mr. Buren, filed a petition verified by its president Suckow, seeking an order directing the trustee to lease the bankrupt's estate to the bankrupt. A certified copy is in the record at 584-588

(received in evidence at R. 643, 644). In that petition Suckow and his company repeated the charges that the present appellees were violating the antitrust laws to their damage. They charged (R. 585):

"* * * that Borax Consolidated, Ltd., maintains and controls a world-wide monopoly in the mining, refining, distribution and sale of borax, a household article of general use;

* * * * * * *

"That in 1930 a suit was commenced entitled 'Borax Consolidated, Ltd., a corporation, v. Suckow Borax Mines Consolidated, Inc., John K. Suckow, et al.' the purpose of which was to establish a lien upon the Suckow Borax Mines Consolidated's undivided one-half of the borax bearing properties for ore alleged to have been taken out by the Suckow interests and not accounted for to Borax Consolidated;

* * * * * * *

"That in the meantime and on June 30, 1931, the petition in involuntary bankruptcy was filed against Suckow Borax Mines Consolidated, Inc., which is now on appeal.

"*That Borax Consolidated initiated all this litigation* including the actions named, *all and solely for the purpose of maintaining its world-wide monopoly as an English corporation and oppressing, harassing and suppressing its sole competitor that he might be removed from the field of world competition;*

* * * * * * *

"That Borax Consolidated, Ltd., has heretofore and is now harassing and interfering with your petitioner in his management and operation of the borax properties for the purpose of maintaining the British monopoly of an American product; *has demanded from time to time* * * * *that your petitioner join with Borax Consolidated in the maintenance of a world-wide monopoly by determining the output, fixing the price and regulating the marketing of the products* of the Kern County borax deposits, all of which your petitioner has declined to do."

12. FEBRUARY 13, 1934: SAME CASE, NO. 16938-H.

On February 6, 1934 Borax Consolidated, Ltd. filed an answer to the foregoing petition for a lease (R. 526-539) and traversed its allegations.

One week later, on February 13, 1934, the Suckow company filed an amendment to its petition and reasserted the same accusations. A certified copy of the amended petition is in the record at R. 588, 589 (offered and received at R. 643, 644).

13. FEBRUARY, MARCH AND APRIL, 1934: SAME CASE, NO. 16938-H.

Thereafter, throughout the months of February, March and April, 1934, hearings occurred in the Bankruptcy Court upon the petition just mentioned. As shown by the affidavit of the Court Reporter who reported those hearings (R. 573, 583; received at R. 643, 644), Suckow's counsel, Mr. Neblett, asserted over and over again the charges of violation of the antitrust laws.

Counsel for Borax Consolidated, Ltd. said (R. 576):

> "Mr. Ashburn: All right. I do not want to be misunderstood. I am not here to block a canvass of these issues. They have been bandied around this town for months and months, and if the bankrupt has evidence to prove them as far as I am concerned, he can go ahead and prove them, * * *."

and to this Mr. Neblett responded (R. 576):

> "I do not want to be misunderstood either. I claim they are true and I claim those allegations will be proved in the proper proceedings at the proper time."

Obviously the proper time was not 13 years later. Mr. Neblett further asserted (R. 579):

> "I expressly state I think the allegations are true and feel they can be proved at the proper time."

14. JULY 18, 1934: BORAX CONSOLIDATED, LTD., PLAINTIFF, V. RUTH E. SUCKOW, JOHN K. SUCKOW, ET AL., DEFENDANTS, NO. 310-J, U. S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

On July 18, 1934, in another action between the Suckows and the present appellees, in which all the present appellants or their testator, Suckow, were defendants, the Suckows filed a lengthy answer in which they reasserted in infinite detail all the charges they had previously made. A certified copy is in the record at R. 248-260. In that answer these accusations were made (R. 248):

> "Answering paragraph XIX of the bill of complaint, these defendants deny that the offers of the plaintiff to do and perform equity are made in good faith; and in this connection these defendants allege that the present action, and in Equity Action No. C-107-H, more particularly described in the bill of complaint, and numerous other actions and transactions instituted and conducted by plaintiff herein, all as more particularly described in the second separate defense hereinafter set forth and by reference made a part hereof, are but a scheme, plan and device by which plaintiff herein is attempting and has attempted to secure and maintain a monopoly on the production and distribution of crude borax, not only in the United States, but throughout the world, and to acquire the properties of these defendants without just or reasonable compensation and to prevent the competition of these defendants, or any of them, in the production and distribution of crude borax and its products."

And in the Second and Separate Defense (R. 249-260) that answer repeated, almost verbatim, the allegations of the First Affirmative Defense of their Answer to Amended Bill filed in December 1932 in action C-107-M (quoted at pp. 15-19, supra).

This occurred just one month to a day before the general settlement of 1934 was entered into and the general releases were given.

G. The Facts Concerning the Releases.

Appellants gave two sets of releases, one in 1934 and one in 1942.

1. THE 1934 RELEASES.

The complaint alleges (R. 65, 66) that John K. Suckow and Ruth E. Suckow entered

> "into an agreement of so-called settlement with defendant Pacific Coast Borax Company, and which agreement was dated the 18th day of August, 1934,"

which provided for a lease of the Suckow operating properties to Pacific Coast Borax Company, conveyances and quitclaims of other properties, dismissals by the Suckows of all actions against Pacific Coast Borax Company, Borax Consolidated, and United States Borax Company, dismissal by the latter of all actions against the Suckows, and cash payment and other consideration to be given to the Suckows, and further provided

> "that said Suckow and said Suckow company should * * * release *all possible claims* against said PCB, BCL and USB."

All things required by the agreement were performed, that is, the releases were given (so alleged, R. 68, line 2).

In confirmation and amplification of these allegations the motion for summary judgment brought the documents before the court.

The agreement of general settlement of August 18, 1934 appears at R. 273-412. It was followed by three documents each entitled "General Release of All Claims," one executed on September 12, 1934 by John K. Suckow and Ruth E. Suckow, one on September 26, 1934 by the Suckow company, and another on the same day by Mojave Borax Company, Ltd. These appear at R. 260-273. Thus, all the present appellants or their predecessor in interest gave releases in September 1934.

More will be said of these releases in the discussion to follow.

2. THE 1942 RELEASE.

The complaint alleges that in December 1942, with the consent of the other appellants, the Suckow company sold its reversion as lessor of an undivided half interest in the property to appellant, Pacific Coast Borax Company, the owner of the other half interest, and released all claims, demands and causes of action (R. 75).

The complaint is disingenuous and characterizes the release as covering "any and all claims, demands and causes of action whatsoever not arising out of or under said agreement of sale" (R. 75), but the release was brought before the court on the motion for summary judgment, and it speaks for itself. As we show in the discussion (pp. 68, 69, infra) it was all comprehensive and clearly covered claims connected with the sale, if there were any. It is dated December 21, 1942 and appears at R. 413-417. It was given by the Suckow company, the only appellant that then had any interest (see p. 10, supra) and was authorized and consented to by the stockholders (R. 423) including appellant Ruth E. Suckow and appellant Tobeler as administrator of John K. Suckow's estate, who were then president and secretary (R. 417).

More will be said of this release later.

H. There Is No Pretense of a Claim Stated on Behalf of Appellants Mojave Borax Company, Tobeler as Executor of Suckow's Will or Ruth E. Suckow.

There were four plaintiffs, the Suckow company, Mojave Borax Company, Ltd., Paul O. Tobeler as Executor of the will of John K. Suckow, and Ruth E. Suckow.

The only allegations in the entire complaint about Mojave Borax Company are that it is a Nevada corporation formed in 1932 (R. 5, para. 4) and that it joined in a quitclaim deed in 1934 (R. 66), but it is not alleged that it had any interest to quitclaim.

The only allegation about Ruth E. Suckow is that she was John K. Suckow's wife at the time of his death and for some years earlier (R. 6, para. 6) and joined in the quitclaim deed (R. 66). This gave her no standing to sue. If Suckow had any rights at the time of his death, they are represented by Tobeler, his executor.

Suckow himself had no such rights, since the complaint alleges (see p. 6, supra) that he transferred to the Suckow company all his interest, title and fee in his operating properties and borax land in March 1929, and it further avers that the alleged conspiracy was thereafter formed.

DISCUSSION

For clarity and convenience we continue to treat the case in its two chronological parts:

1. Relative to all matters alleged to have occurred to and including the general settlement of 1934.

2. Relative to all matters alleged to have occurred thereafter and through the settlement of 1942.

I.

DISCUSSION RELATIVE TO ALL EVENTS ALLEGED TO HAVE OCCURRED THROUGH THE GENERAL SETTLEMENT OF 1934

A. On the Face of the Complaint These Claims Are Barred by the Statute of Limitations.

Since the law on this subject was thoroughly briefed in the *Burnham* case, and since this Court there stated the controlling principles, we shall not rebrief the matter but shall rely on this Court's decision.

1. THE CONTROLLING PRINCIPLES AS LAID DOWN BY THIS COURT IN THE BURNHAM CASE. THE STATUTORY PERIOD IS THREE YEARS AND THE STATUTE RUNS AGAINST EACH OVERT ACT.

In a private party treble damage suit under the Sherman Act the statute of limitations is the applicable statute of the state

wherein the suit is brought. In California it is Section 338, subd. (1) of the *Code of Civil Procedure,* the section applicable to liabilities created by statute other than for a penalty or forfeiture. The period of time is 3 years. The statute begins to run against each item of damage separately, and recovery may be had only for such damage as has been sustained from overt acts occurring within the three-year period immediately preceding the filing of the action.[15]

Ordinarily the damage occurs when the overt act is committed, but in any event the statute begins to run relative to each item of damage when the overt act causing that damage is committed regardless of when the damage culminates. As said in *Momand v. Universal Film Exchange,* 43 F. Supp. 996 (Wyzanski, J.), at p. 1006:

> "* * * Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. * * *"

In affirming, the Court of Appeals for the First Circuit said on December 21, 1948, in *Momand v. Universal Film Exchanges,* 172 F.2d 37, 49:

> "We think the trial court properly ruled that a cause of action for each invasion of the plaintiff's interest arose at the time of that invasion and that the applicable statute of limitations ran from that time."

Certiorari was denied in the *Momand* case on May 2, 1949 (336 U.S. 967).

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[15]To the same effect are the cases cited in footnotes 6 and 7 of this Court's opinion in the *Burnham* case and *Momand v. Universal Film Exchanges,* 172 F.2d 37, 47 (1 Cir.), decided Dec. 21, 1948.

2. THE CLAIMS ARE BARRED ON THE FACE OF THE COMPLAINT.

The bulk of the allegations of the complaint relate to alleged overt acts culminating in alleged damage no later than 1934, 13 years before the suit was instituted (see pp. 6-10, supra). At that time appellants went out of the borax business entirely. The cause of action, if any, for damages resulting from these activities accrued no later than that date, and the statute began to run no later than 1934 and barred any claim for relief at least 10 years before this suit was instituted.

3. THE STATUTE OF LIMITATIONS CAN BE RAISED ON THE FACE OF A COMPLAINT BY A MOTION TO DISMISS.

To avoid dismissal appellants argue (Br. 79-81) that the statute of limitations cannot be raised on a motion to dismiss. The argument is without merit.

After the adoption of the Federal Rules of Civil Procedure in 1938 some district judges did hold that the statute could only be raised by answer. But these judges overlooked Rule 9(f) which provides that

> "For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter."

2 *Moore's Federal Practice* (2d ed.), p. 1920 states:

> "Since time is material under subdivision (f) for purposes of testing the sufficiency of a pleading, a motion to dismiss because the statute of limitations has run may be utilized, without supporting affidavits, whenever the time alleged in the statement of claim shows that the cause of action, whether ex contractu or ex delicto, has not been brought within the statutory period."

And Moore cites numerous decisions which quoted with approval the same passage from the first edition (1 *Moore,* 1st ed., p. 597). Elsewhere in his work (Vol. 2, 2d ed., p. 2257) Moore discusses the subject more fully and, after noting that the

common-law rule that allegations of time are not material had been changed by Rule 9(f), continues:

> "Accordingly, it is now held that the defense of limitations may be raised by motion to dismiss when the time alleged in the complaint shows that the action was not brought within the statutory period."

A great body of cases has reached the same conclusion. Of the many, we cite:

Berry v. Chrysler Corporation, 150 F.2d 1002 (6 Cir.);

Kithcart v. Metropolitan Life Insurance Company, 150 F.2d 997 (8 Cir.), cer. den. 326 U.S. 777;

A. G. Reeves Steel Const. Co. v. Weiss, 119 F.2d 472 (6 Cir.), cer. den. 314 U.S. 677;

Gossard v. Gossard, 149 F.2d 111 (10 Cir.);

Wright v. Bankers Service Corporation, 39 F. Supp. 980 (S.D. Cal.);

Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969 (S.D. Cal.).

These cases cite numerous others and thoroughly discuss the subject.[16]

It is settled in California that, where the bar appears on the face of the complaint, the statute of limitations may be raised by demurrer, the objection being, in legal effect, that the complaint does not state a cause of action. The common-law rule was that it could only be raised by answer, but the rule in equity was that it could be raised by demurrer. California long ago adopted the equity practice (*Bank of America, etc. Assn. v. Ames,* 18 C.A.2d 311), and, as pointed out in *Abram v. San Joaquin Cotton Oil Company,* supra, the present Federal Rules are modeled largely on the former Equity Rules.

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[16]Appellants' assertion (Br. 80) that this Court in *Bowles v. Glick Bros., etc.,* 146 F.2d 566, held otherwise is pure fancy. That case is not in point.

4. APPELLANTS' ARGUMENT OF "CONTINUING CONSPIRACY" WAS REJECTED AS UNSOUND IN THE BURNHAM CASE.

As their next attempt to escape the statute of limitations, appellants argue that the gist or gravamen of the cause of action is conspiracy, that there was a "continuing conspiracy," and that the statute of limitations does not begin to run until the last overt act. Parts II, III and V of appellants' brief (Br. 56-60, 63-67) all make this same argument.

The cases relied upon are criminal cases.[17] Exactly the same argument, based on the same citations, was made and rejected by this Court and by the United States Supreme Court in the *Burnham* case and a little later by the First Circuit in *Momand v. Universal Film Exchanges,* 172 F.2d 37, 49, cer. den. 336 U.S. 967 (May 2, 1949) where the court said that the argument was "based on a mis-reading of the criminal cases."[18] The theory of continuing conspiracy applicable in criminal cases is not applicable in civil cases for damages, and, as already noted, the statute runs separately against each overt act.

5. THE ARGUMENT ABOUT "NONDISCOVERY," FRAUD AND CONCEALMENT WAS LIKEWISE REJECTED AS UNSOUND IN THE BURNHAM CASE.

The next argument by which appellants would escape the statute of limitations is that they had no knowledge of the alleged conspiracy until 1944, that the action was one for fraud, and that the conspiracy was "fraudulently concealed" by appellees (Br. 67).

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[17]The only civil case that appellants cite is *Albert Pick-Barth Co. v. Mitchell, etc. Co.,* 57 F.2d 96. What they state about that case seems to have been copied verbatim from the Burnham company's Reply Brief (p. 6) and its petition for rehearing (p. 6) in this Court. The *Pick-Barth* case involved no question of the statute of limitations. The very passage quoted by appellants shows the distinction between criminal cases and civil actions for damages. It states that to constitute an offense [i.e., criminal violation] under the Sherman Act, it is not necessary to show an overt act, but that in order to create a private cause of action for damages there must be overt acts.

[18]Other cases to the same effect are cited in footnotes 6, 7 and 10 of this Court's opinion in the *Burnham* case.

The argument was made in identical form in the *Burnham* case and there rejected. This Court there held[19]:

1. That an action for damages for violation of the antitrust laws is not one for fraud. C.C.P. Section 338(4), which tolls the running of the statute of limitations in fraud cases until "discovery," is not applicable.

2. Consequently, the statute of limitations begins to run from the moment a cause of action arose whether the wronged party knew that he had a cause of action or not. Ignorance of the injury or of the facts constituting the injury does not prevent the running of the statute. The fact, if it be a fact, that a plaintiff did not make "discovery" until a later date is irrelevant.[20]

Thus on the face of the complaint no valid excuse for the delay in suing is even pleaded.

The only allegations relative to delay in suit are that in September, 1944, the United States filed an indictment and bill in equity against some of the appellees charging violation of the antitrust laws and "that it was not until subsequent" to that

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[19]To the same effect: *Foster & Kleiser v. Special Site Sign Co.,* 85 F.2d 742 (9 Cir.); *State of Oklahoma v. American Book Company,* 144 F.2d 585 (10 Cir.).

[20]Appellants' brief (pp. 74-79) invokes *American Tobacco Company v. Peoples Tobacco Company,* 204 Fed. 58; *Bailey v. Glover,* 21 Wall. 342, and *Holmberg v. Armbrecht,* 327 U.S. 392. This section of the appellants' brief is almost a verbatim copy of pages 26-29 of the Burnham company's petition for rehearing in this Court.

The *Holmberg* case merely held that, in a suit in a federal court on a federally created right, state statutes of limitations do not apply in a suit in equity but do apply in an action at law, unless the federal statute contains its own period of limitations. *Bailey v. Glover* held that, if the federal statute prescribes its own period of limitations, it is to be read as including a provision that, if the cause of action is based on fraud, it does not accrue until discovery. Now, the Sherman Act does not contain its own statute of limitations, and, as this Court held in the *Burnham* case, a suit under the Sherman Act is an action at law, not a suit in equity, and it is not an action for fraud.

The *American Tobacco* case arose and was tried in the State of Louisiana. Consequently, the Louisiana law of limitations applied as does California law here. The court there merely applied the Louisiana law, not relevant here.

event "that plaintiffs herein, or any of them, discovered the true facts of the situation presented herein or learned of said 'general conspiracy' referred to hereinabove, or the facts that said defendants herein had violated said Sections 1 and 2 of said Title 15A." (Para. 84, R. 68.) Similar allegations appear in paragraph 89 (R. 76). And in paragraph 91 (R. 77) it is asserted that the conspiracy was a "fraud" upon appellants.

But, as we have seen, the allegation that there was no discovery is irrevelent. And the allegation that the conspiracy was a "fraud" is an erroneous statement of law and not an allegation of fact.[21] Like the old demurrer, a motion to dismiss does not admit conclusions of law or unwarranted deductions of fact. 2 *Moore's Federal Practice* (2d ed.), p. 2244.

Nothing is left but appellants' further claim of "fraudulent concealment." An action for fraud and fraudulent concealment are two different things. In any action in California the running of the statute of limitations can be tolled by "fraudulent concealment." But, before appellants could reach the question, "fraudulent concealment" would have to be alleged properly.

In the *Burnham* case this Court held that silence on the part of an alleged wrongdoer is not fraudulent concealment, that "mere failure by a defendant to disclose to a plaintiff the existence of the facts does not constitute fraudulent concealment." Fraudulent concealment requires affirmative and positive acts in the nature of artifice to conceal the facts, some trick or contrivance to exclude suspicion and prevent inquiry.[22]

The only allegation in the complaint on fraudulent concealment is in paragraph 91 (R. 77) where the bare allegation appears,

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[21]Indeed, any attempt to assert fraud rather than violation of the Sherman Act as the gravamen of the complaint in this case would oust a federal court of jurisdiction, because there is no diversity of citizenship. The case comes into a federal court only as an action upon a statutory liability; as such it falls under subdivision 1 of Section 338, *C.C.P.*

[22]To the same effect: *Foster & Kleiser v. Special Site Sign Co.*, supra, and cases cited in footnotes 14 and 15 in the *Burnham* opinion.

"That said 'general conspiracy' was fraudulently concealed by said defendants from plaintiffs and each of them until the time of discovery thereof as aforesaid by plaintiffs."

This allegation is a conclusion of law, without any supporting allegation of fact. The law is settled that a plaintiff who seeks to escape the bar of the statute of limitations on the theory of fraudulent concealment must allege facts and not conclusions, and this Court has so held in the *Burnham* case.[23] There the complaint at least made some pretense of complying with this requirement by averring that the plaintiff had accused the defendants of wrongdoing and that defendants had denied the accusation. That averment was held to be insufficient and shown to be sham. Yet there was not even that allegation here.

B. Dismissal Because of the Statute of Limitations Was Proper on the Motion for Summary Judgment:—Appellants' Excuses for Delay Are Pure Sham.

We have shown that on the face of the complaint the claims were barred by the statute of limitations. But, in addition, the incontrovertible facts demonstrate that the claims of non-discovery and concealment are pure sham. Consequently, dismissal was also proper on the motion for summary judgment.

1. COURTS HAVE CLEAR POWER TO GRANT A MOTION FOR SUMMARY JUDGMENT WHEN THE BAR OF THE STATUTE OF LIMITATIONS IS SHOWN BY UNDISPUTED FACTS OUTSIDE THE COMPLAINT.

In view of this Court's decision in the *Burnham* case and in *Gifford v. Traveler's Protective Assn.,* 153 F.2d 209 (and see 2 *Moore's Federal Practice,* 2d ed., p. 2257), appellants concede (Br. 81) that the bar of the statute of limitations can be raised by a motion for summary judgment. But they resort to the rule that such a motion cannot be granted if there is a genuine issue of fact (Brief 3, 48, 55). That is a truism not pertinent to the case.

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[23]And see cases cited in footnote 16 in the *Burnham* opinion.

To create an issue of fact, appellants merely argue that on a motion for summary judgment allegations of a complaint must be accepted as true.[24] As we have seen (pp. 38 to 40, supra), the complaint contains no proper allegations excusing delay in suit. Beyond that, it is settled that the allegations of a complaint are not controlling, the problem being to ascertain from the material offered on the motion for summary judgment whether a genuine issue of fact remains. In the *Burnham* case, this Court affirmed a summary judgment despite allegations in the complaint concerning fraudulent concealment and non-discovery more specific than those here (Cf. p. 40, supra). In *Lindsey v. Leavy,* 149 F.2d 899 (9 Cir.), this Court held that:

> "The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. For a further discussion of this principle see 3 Moore's Federal Practice, pp. 3174, 3175. The rule is now well established in the many cases dealing with the problem."[25]

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[24]Most of the cases cited do not even involve motions for summary judgment but merely motions to dismiss based on the pleadings alone; e.g., *Ledbetter v. Farmers, etc. Co.,* 142 F.2d 147; *Willson v. Graphol Products Co.,* 165 F.2d 446; *United States v. Frankfort, etc.,* 324 U.S. 293, which was a criminal case involving a demurrer to the indictment. Another case, *Ansehl v. Puritan etc. Co.,* 61 F.2d 131, was decided in 1932, years before the adoption of the Federal Rules of Civil Procedure under which motions for summary judgment are permitted. Another, *Domestic and Foreign Commerce Corporation v. Littlejohn,* 165 F.2d 235, related to the particular problem of jurisdictional allegations in suits against officers of the United States to avoid the rule that the United States cannot be sued without its consent (see *Land v. Dollar,* 330 U.S. 731, 735).

[25]In *Associates Discount Corporation v. Crow,* 110 F.2d 126, the court said that on motions for summary judgment, if there are material facts in dispute, the court should "specify in a finding the facts that appeared * * * without substantial controversy, and to go forward with the trial

And see *Piantadosi v. Loew's Inc.,* 137 F.2d 534 (9 Cir.).

The cases that appellants cite to support the contention that allegations of a complaint must be accepted as true have their source, as they show, in *Farrall v. District of Columbia Amateur Athletic Union,* 153 F.2d 647. But the rule as actually stated in that case was that

> "if the averment in the complaint is a mere conclusion or a vague generality without specification, and the affidavit asserts facts which are undisputed, and it thus appears that there is in truth no genuine issue of fact, the court may act upon that premise" (p. 648).

A plaintiff may not escape a summary judgment unless there is a *genuine* issue of fact. R.C.P. Rule 56 speaks of the necessity of a "*genuine* issue." 3 *Moore's Federal Practice* (1st ed.), p. 3185, quotes from a case which points out that the rules for summary judgment

> "would serve no purpose whatever if frivolous and transparently insufficient proofs and arguments such as have been brought forward here be held to create a triable issue. The already overcrowded trial term calendars would be cluttered up with phantom issues, the disposition of which would usurp and waste the time of the court."

Appellants speak in generalities and neither point nor can point to any concrete issues.

2. THE FACTS ARE UNCONTRADICTED AND INDISPUTABLE. THERE IS NO CONCEIVABLE ISSUE OF FACT.

The material brought forward on the motion for summary judgment created no issue of fact but showed that there was no issue. It did not consist of the testimonial assertions of some affiant, as a witness, susceptible of a testimonial conflict, but of

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in respect of those which remained in dispute." If appellants were to attempt to state what factual issues remain for trial, what possibly could they specify?

certified copies of pleadings by the Suckows in court proceedings and of reporter's transcripts of statements made by their attorneys. It consisted of assertions of the present appellants and their predecessors solemnly made in numerous judicial proceedings years ago, wherein the present appellants made against the present appellees the very accusations of violation of the antitrust laws which they now make.

We shall not repeat but merely refer to the facts stated at length at pp. 10 to 30, supra.

None of these facts are denied. And in their very nature they were no more controvertible than the existence of a mountain standing before our eyes can be controverted by denying its presence. Against such proof conclusory material in a complaint can raise no issue.

The facts are similar in character to those upon the basis of which this Court affirmed the dismissal in the *Burnham* case. But, while similar in character, they are much stronger, for Burnham's accusations were made either out of court or in a lawsuit to which the alleged antitrust violators were not parties, while appellants' accusations were made in lawsuits in which appellees were the adversaries.

The facts are also infinitely stronger than those which motivated this Court to hold against a claim of non-discovery and concealment in *Foster & Kleiser v. Special Site Sign Co.*, 85 F.2d 742, an antitrust suit. This Court, in finding that plaintiff had knowledge of sufficient facts to put it on notice, pointed out that 16 years earlier defendant had offered to make the plaintiff's president head of a "country department" and informed him that the purpose of the country department was to crush independent firms (p. 752).

Strikingly similar statements appear in the record here. For example, in November, 1933, Mr. McManus, Receiver of the Suckow company, stated that Pacific Coast Borax Company had offered Suckow an independent income for life on condition

that he would not develop his borax lands (see p. 22, supra). Again, Suckow's counsel in January, 1934, asserted that Borax Consolidated, Ltd. had requested Suckow "to enter into a price fixing and marketing agreement" and that Suckow refused because "plaintiff's [Borax Consolidated, Ltd.] offer was a suggestion that Suckow violate the Anti-Trust Law." (See p. 26, supra.) And in January, 1934, the Suckows formally alleged under oath in a petition in the bankruptcy court that appellees had repeatedly demanded that appellants join in an anti-trust conspiracy (see p. 28, supra).

And we may note again that in the spring of 1934 counsel for Pacific Coast Borax Company in certain litigation challenged the attorney for the present appellants to prove the allegations of violation of the antitrust laws, and counsel for appellants replied that he could prove them and would do so at the proper time (see p. 29, supra).

The documents not only show that any claim of lack of knowledge is sham, they demonstrate the same fact about any claim of fraudulent concealment. The only claim of "fraudulent concealment" made below was that certain appellees had denied that they were guilty of violating the antitrust laws when accused by appellants in litigation over 13 years before the present suit was started. As we noted at pp. 28, 29, supra, the facts are merely that in February 1934 the Suckow company applied to the Bankruptcy Court for a lease, in its petition accused certain of the present appellees of violating the antitrust laws, and those appellees in their answer to the petition traversed the accusation.

In the *Burnham* case this Court held that denial of an accusation of wrongdoing is not fraudulent concealment. Denial of an accusation by the wronged party that the defendant has injured him by acts in violation of the antitrust laws is not fraudulent concealment. The fact of accusation itself rebuts any contention of "nondiscovery." A person suspecting that a wrong has been

perpetrated upon him cannot stop the running of the statute by going to the alleged wrongdoer and obtaining a statement that no wrong was committed.[26]

In the *Burnham* case accusation and denial were out of court. Here they were part of pleadings. If a denial in an answer of an allegation in a complaint constituted "fraudulent concealment," a plaintiff in almost any lawsuit could abandon his case and renew it at any future date, however remote, without fear of being barred by the statute of limitations. The claim is absurd.

Moreover, after the appellees made their denial in 1934, the Suckow company filed an amended petition in the bankruptcy court reasserting its accusations and subsequently repeated them in hearings in that matter and in pleadings in subsequent lawsuits (see pp. 29, 30, supra). As was noted by this Court in the *Burnham* case (in footnote 4), one who repeats his accusations after an alleged act of fraudulent concealment cannot claim that the statute is tolled; fraudulent concealment rests on principles of estoppel, estoppel requires reliance, and reliance requires belief.[27] There is no reliance where one does not believe the denial and continues thereafter to repeat his accusations.

Appellants' Counteraffidavits.

Appellants filed three affidavits in opposition to the motion for summary judgment. None of them questioned any fact brought forth by appellees, and none raised any issue of fact. And appellants' brief does not refer to or rely on them. Consequently, we do not discuss them here. But in order that the matter may be

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[26]And to the same effect, *Feak v. Marion Steam Shovel Co.,* 84 F.2d 670 (9 Cir.), cer. den. 299 U.S. 604; *Neff v. New York Life Ins. Company,* 30 Cal.2d 165; *Burchmore v. H. M. Byllesby & Co.,* 1 N.W.2d 327 (Neb. 1941); *Phillips v. Baker,* 114 S.W.2d 421 (Texas 1938); *Jackson v. Buchanan,* 59 Ind. 390.

[27]To the same effect: *Neff v. New York Life Insurance Company,* 30 Cal.2d 165; 3 *Pomeroy's Equity Jurisprudence* (5th ed.), Sec. 812, p. 230; Sec. 890, p. 502.

fully before the Court, particularly if appellants refer to the affidavits in a reply brief, we consider them in Appendix 2 to this brief.

3. THE ARGUMENT THAT, WHILE APPELLANTS BELIEVED THAT THERE WAS A CONSPIRACY FORMED IN 1927, THEY DID NOT HAVE IN MIND ONE FORMED IN 1929, IS FALSE IN FACT AND IRRELEVANT IN LAW.

Appellants admitted below that they repeatedly accused the appellees of violating the antitrust laws by conspiracy to drive appellants out of business. They also admitted that they knew of the identical overt acts which caused their damage, and that they knew of them when they occurred and knew who committed them. For example, counsel argued:

> "'Of course the plaintiffs knew what was happening to them. They knew when these people were attempting to destroy the property, the mine; they knew these various things were happening to them. But they did not know that this was the result of this 1929 conspiracy. Every one of these overt acts, as a matter of fact, constituted a conspiracy upon which plaintiffs could sue independently had they elected to do so, but they did not so elect" (R. 647, 648).

In short, appellants sought to escape the facts by contending that they were suing upon a conspiracy formed in a different year from the one they had been charging over the years. Indeed, this was appellants' principal argument below. While it has not been made in appellants' brief, we now discuss it because it shows in a striking way the utter hollowness of their case.

The argument is both false in fact and irrelevant in law.

False in Fact.

1. In January 1930, in litigation in the United States District Court in Los Angeles with some of the present appellees, Suckow filed an affidavit accusing them of a conspiracy *formed in 1929*. We quoted at length from this affidavit at pp. 12, 13, supra. Summarizing the quotation, it is alleged that through an agreement of the large producers of borax in 1905 production

was curtailed, competition eliminated and the price of borax increased; that subsequent to 1920 through competition between Borax Consolidated, Ltd. and other producers of borax, including American Potash & Chemical Corporation, the price of borax declined *until December 1929,* and that Borax Consolidated, Ltd. and its subsidiaries "is again endeavoring to control and curtail production and eliminate competition by agreement and otherwise"; that Suckow was approached in December 1929 by an agent of one of the appellees to curtail production and eliminate competition and that subsequent to the month of December 1929 (prior to the filing of the affidavit on January 13, 1930) the price of borax again rose, and that the increase "is directly due to some agreement" between the various producers of borax.

2. Moreover, the complaint itself alleges that the alleged 1929 agreement was nothing but a reduction to writing of previous conspiracies. Paragraph 73 of the complaint alleges (R. 38):

> "that said '1929 agreement' constituted a reduction to writing of the previous verbal and written agreements, understandings, combinations and conspiracies of defendants and, from time to time made and entered into by said defendants during the years previous to the making and entering into of said 'agreement of 1929'."

Being confronted below with this allegation, appellants rushed in with a Second Amendment to the Complaint purporting to amend paragraph 73 by withdrawing it completely and substituting a wholly different allegation (R. 82). That amendment cannot aid appellants. An amendment which does not seek to cure a defective complaint by adding a missing allegation but seeks to omit an allegation injurious to the pleader's case is held to be sham. *Silica Brick Co. v. Winsor,* 171 Cal. 18, 22; *Treager v. Friedman,* 79 C.A.2d 151, 172.

Irrelevant in Law.

1. A similar argument was made in the *Burnham* case (see pages 2-4 of Burnham's brief in reply to brief of Borax Consolidated, Ltd.). It was rejected. There the plaintiff admitted that it knew that it had sustained damage and that the defendants had caused that damage, but claimed that it did not know that defendants had acted in conspiracy. A similar excuse was rejected in *Strout v. United Shoe Machinery Co.*, 208 Fed. 646, cited by this Court both in the *Burnham* case and in the *Foster & Kleiser* case, supra. In the present case appellants' argument is weaker. Appellants have not only admitted that they knew all that Burnham knew but they admitted what Burnham denied, namely, that they believed and were convinced that the overt acts were committed in pursuance of a conspiracy in violation of the antitrust laws; all that they claim they did not know was that the conspiracy was formed in one year instead of another. The excuse having been rejected in the *Strout* and *Burnham* cases as insufficient, the infinitely weaker excuse here is even more insufficient.

2. Moreover, *in law* appellants' alleged cause of action is not for a conspiracy formed in 1929, or for a conspiracy formed at any time, but for damage resulting from certain overt acts. (So held by this Court in the *Burnham* case, and see pp. 37, supra, and 71, 72, infra.) Whether those acts became actionable by reason of a conspiracy formed at one date rather than another would not change the cause of action. The cause of action would be the same.

An all-conclusive answer to appellants' contention will be found in *F. L. Mendez & Co. v. General Motors Corp.*, 161 F.2d 695 (7 Cir.), cert. den. 332 U.S. 810. There plaintiff alleged that it had been the owner of a retail automobile dealership which it held from defendant's subsidiary and that the defendant cancelled the agreement. Plaintiff first sued on the claim that this

was done pursuant to and as part of a conspiracy in restraint of interstate commerce and sought treble damages under the Sherman Act. Judgment having gone for defendant, plaintiff sued again, alleging the same facts but claiming that the cancellation of the dealership was wrongful, not because it was made in pursuance of a conspiracy illegal under Title 15 U.S.C. Sec. 1 (the Sherman Act), but under Title 15 U.S.C. Sec. 14, a section of the Clayton Act, unrelated to conspiracy.

The complaint was held properly dismissed on the ground that the cause of action alleged in the second case and that alleged in the first case were one and the same; thus the judgment in the first case was *res judicata.* Plaintiff contended that the two suits required different proof. The Circuit Court held that they were nevertheless the same cause of action. The entire opinion of the court is pertinent, but we quote only briefly:

> "The fact that in one case defendant's repudiation of the contract was alleged to have been wrongful for one reason and in the other for another reason does not alter the fact that the cause of action was for the same injury,—wrongful cancellation of the franchise." (p. 697)

The court distinguished criminal prosecutions from civil actions. While the United States could separately prosecute the defendants for violating the Clayton Act and the Sherman Act, "for each violation constituted a separate offense," (p. 698):

> "We are dealing with a civil suit in which the private right of plaintiff has been, as it says, unlawfully taken from it. It has one right and one only; the right to enjoy its contract. It complains of one wrongful act, namely, deprivation of that right. Its action is not for recovery under the Sherman Act or for recovery under the Clayton Act but for recovery for the wrongful cancellation of its property right. The gist of its action is its injury arising from alleged wrongful deprivation of its contract right."

Thus in the *Mendez* case two suits were held to be on the same cause of action because the overt acts and the damage

were the same, and it was held to be irrelevant that those acts were made illegal in one case by a conspiracy in restraint of trade and in the other, not by such a conspiracy, but by the intention to force plaintiff not to deal in goods of a competitor. The principle applies with infinitely greater force here. In this case appellants' cause of action was to recover for damages arising from certain overt acts, said to be illegal by reason of a conspiracy in restraint of trade. Whether those overt acts were illegal because the conspiracy was formed in one year instead of in another is of no consequence.

3. If one believes that he has been defrauded on one material matter, he may not rely on other representations by the wrongdoer. *Evans v. Duke,* 140 Cal. 22; *Nicolaisen v. Toffelmier,* 97 Cal. App. 342. By analogy, where one seeks to toll the statute of limitations because of fraudulent concealment, reliance is necessary, and since appellants believed that appellees had committed acts to their damage under a conspiracy illegal under the Sherman Act (regardless of when formed), they were not relying on appellees and would have had no right to do so. As shown at pp. 20, 22, 26, 27, supra, in 1933 and 1934 they were accusing the appellees of acting in bad faith and of resorting to "ruses" and "ingenious schemes" to hide what they were doing. Cf. *Turman v. Holmes,* 29 C.A.2d 198.

Indeed, appellants are in a dilemma. The only fraudulent concealment claimed is denial by appellees of appellants' accusations. If the accusations had to do with a conspiracy formed in 1927 and not in 1929, then the only denial was of a 1927 conspiracy. If a suit on a conspiracy formed in 1929 is not the same as that which was involved in the accusation, there was never a denial of what is now charged. If it is the same, the denial was not believed. In either event, there was no "fraudulent concealment."

C. The Claims Were Released, a Fact Not Only Shown on the Face of the Complaint but Indisputably Established by the Documents Filed in Support of the Motion for Summary Judgment.

As we showed on p. 8, supra, in August 1934 Suckow's borax properties were leased to certain appellees, the Suckow company went out of business, and in September 1934 all appellants or their predecessors gave releases. As a consequence all claims have been forever released.

1. ALL APPELLEES WERE RELEASED.

The releases explicity released by name Pacific Coast Borax Company, Borax Consolidated, Ltd. and United States Borax Company and "their and each of their stockholders, directors, officers, agents, servants, employees, attorneys-in-fact and attorneys at law." (R. 260, 263, 268). Thus the releases covered C. M. Rasor, testator of appellee Bank of America N. T. & S. A., and appellees Frank M. Jenifer and James M. Gerstley, they being such officers and employees (cf. R. 56, 301).

Since a suit for treble damages for violation of the antitrust laws is a tort claim (*Clark Oil Company v. Phillips Petroleum Company,* 148 F.2d 580, 583 (8 Cir.) cer. den. 326 U.S. 734; *Northwestern Oil Company v. Socony Vacuum Oil Company,* 138 F.2d 967, 971 (7 Cir.) cer. den. 321 U.S. 792; *Williamson v. Columbia Gas & Electric Corp.,* 110 F.2d 15, 18 (3 Cir.) cer. den. 310 U.S. 639), all the other appellees were likewise released from any claim for participation in the alleged conspiracy, under the elementary principle that the release of one joint tortfeasor releases all others. *Bee v. Cooper,* 217 Cal. 96 (a conspiracy case); *Restatement of Torts,* Sec. 885. Thus Stauffer Chemical Company, and West End Chemical were released of claims that may have arisen, if any, from alleged participation in the conspiracy.

2. THE RELEASES WERE ALL-COMPREHENSIVE.

Each of the releases specified that it covered (R. 261, 263-4, 269-70).

"any and all actions and causes of action, claims and demands whatsoever, whether or not well founded in fact or in law, and of and from any and all manner of suits, debts, dues, sums of money, accounts, reckonings, * * * controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which * * * the undersigned has had or now has or which they or their heirs, executors, administrators or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsover, whether herein specifically mentioned or otherwise, from the beginning of the world to the date of these presents; *and full satisfaction of all* of said claims, demands, causes of action, suits, debts, dues, sums of money, accounts, reckonings, * * * controversies, agreements, promises, trespasses, damages, judgments and executions, *is hereby acknowledged.*"

3. THE DEFENSE OF RELEASE MAY PROPERLY BE RAISED ON MOTION TO DISMISS AND FOR SUMMARY JUDGMENT.

Appellants' discussion of the subject of release is sketchy (Br. 82-84). The principal argument by which they would avoid the effect of the releases is the contention that the defense can only be raised by answer and may not be raised by motion to dismiss or motion for summary judgment.

The only case cited, *Jack Mann Chevrolet Co. v. Associates Inv. Co.,* 125 F.2d 778 (6 Cir.), holds nothing of the sort.

If the facts constituting any affirmative defense appear in the complaint, as here, or are established without dispute, leaving no genuine issue of fact, also as here, the defense can be raised by motion. This Court has so held in *Gifford v. Travelers Protective Association of America,* 153 F.2d 209 (9 Cir.).

As 2 *Moore's Federal Practice* (2d ed.), Section 8.28, page 1698, says:

"Rule 8(c) might seem to imply that affirmative defenses may be raised only by a pleading (where one is required or permitted) and not otherwise. This, however, is too narrow a construction of the rule. A defendant may move for summary judgment under Rule 56 where 'there is no genuine issue as to any material fact' and he 'is entitled to a judgment as a matter of law'; and it is clear that summary judgment is proper where the defendant shows the existence of an affirmative defense even though he has filed no answer. Under the 1946 amendment to Rule 12(b), it is also made clear that a defendant may raise an affirmative defense by a motion to dismiss for failure to state a claim; and that the court may treat such a motion as a motion for summary judgment. Prior to this amendment, most courts had held that an affirmative defense might not be raised by motion where the defense did not appear on the face of the complaint, although some courts sanctioned the use of the 'speaking motion' to show facts negating plaintiff's claim. By analogizing the motion to a motion for summary judgment, however, the amended Rule 12(b) clearly permits affirmative defenses to be raised by motion."

Moreover, in the instant case the fact of releases was not new matter first brought into the case by the motion for summary judgment. The releases were alleged in the complaint, and the motion merely brought forward the documents themselves. If the summary judgment procedure could not perform that office, it would be a futile addition to federal practice. Cf. *Lindsey v. Leavy,* 149 F.2d 899 (9 Cir.).

4. APPELLANTS' ALLEGATION TO ESCAPE THE RELEASES IS IRRELEVANT. A RELEASE SPECIFYING UNKNOWN CLAIMS IS EFFECTIVE TO RELEASE CLAIMS THOUGH UNKNOWN.

The complaint alleges (R. 67) that at the time of execution and performance of the August 1934 agreement the appellants and John Suckow did not know of the conspiracy or appellees' alleged violation of the antitrust laws. This allegation is the only one in the complaint by which appellants seek to avoid the effect of the releases.

It is irrelevant, because the releases intentionally released all claims whether known or unknown.

The releases recite:

> "It is the *specific intent and purpose hereof to release and discharge any and all claims* and causes of action of any kind or nature whatsoever, *whether known or unknown* and whether specifically mentioned herein or not, which may exist or might be claimed to exist at or prior to the date hereof, and the undersigned specifically waives any right or claim of right to hereafter assert that any cause of action or alleged cause of action or claim or demand of any nature or kind whatsoever has been, through oversight or error or intentionally, or unintentionally, omitted from this release.
>
> "The undersigned further state and agree that they have read this instrument in full; that they fully understand the same and have executed it freely and in consideration of the payment or promise of payment of certain moneys by Pacific Coast Borax Company to John K. Suckow and Ruth E. Suckow, or one of them." (R. 261, 264, 269, 270).

Two of the three releases were executed by Frank Buren, as Secretary of the Suckow company and of Mojave Borax Company, and Buren is an attorney at law and is one of appellants' counsel (see p. 21, supra).

Appellants cite Civil Code Section 1542 that

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

This section refers only to a "general release." It does not pertain to a release expressly providing that it covers all claims whether or not known or suspected at the time. Such is the express provision of the releases in the present case.

A release which specifically covers unknown claims is fully effective and does not fall within Section 1542. *Berry v. Struble,* 20 C.A.2d 299 (rehearing by Supreme Court denied); *Pacific*

Greyhound Lines v. Zane, 160 F.2d 731 (9 Cir.) (treating of Sec. 1542).

The release being before the Court, it speaks for itself, and no issue as to its meaning can be raised by characterizations in the complaint. Cf. *Zeligson v. Hartman-Blair, Inc.,* 126 F.2d 595 (10 Cir.).

5. APPELLANTS' ALLEGATION TO ESCAPE THE RELEASES IS FALSE AND SHAM. APPELLANTS WERE AWARE OF THEIR CLAIMS.

The allegation was sham as well as irrelevant. As we have shown (pp. 11-30, supra), for years preceding these releases various litigation between the Suckows and the appellees Borax Consolidated, Ltd., Pacific Coast Borax Company and associated companies had been pending in various courts, and in that litigation, *since as early as January 1930, the Suckows and the Suckow company and Frank Buren, its Secretary and attorney, repeatedly accused those appellees of conspiracy and of violation of the antitrust laws to their damage.*

The releases were given as part of the general settlement agreed to on August 18, 1934 (see pp. 8, 31, supra). *But only one month before*—on July 18, 1934—in one of these actions in the United States District Court for the Southern District of California, between Borax Consolidated, Ltd. as plaintiff and the Suckows as defendants, the latter filed an answer repeating these accusations in great detail (see p. 30, supra). The releases were part of a complete and total settlement of all this litigation, of all these controversies, and of all these asserted claims, charges, accusations, and counter-charges that had been going on for years. *Having been subjected for years to litigation, charges and accusations, including accusation of violation of the antitrust laws, Borax Consolidated, Ltd., Pacific Coast Borax Company and their associates were "buying their peace," they were buying a release from all such claims.*

That the agreement of August 18, 1934, was a complete settlement of all controversies is demonstrated by a summary

of the agreement which we attach to this brief as Appendix 1, which also shows that a very substantial consideration was given amounting by way of cash and cross-releases of judgments and claims to more than $600,000.

Section 1542 of the California Civil Code, cited by appellants and quoted above, contains the words "or suspect" and shows that even a mere general release which fails to specify unknown claims nevertheless covers claims of which the releasor has no more than a mere suspicion. Here it is beyond dispute that appellants had far more than "suspicion" of their present claims when the releases were given. They had been asserting them for a long time.

Appellants concede (see p. 46, supra) that at the time they gave the releases (1) they fully knew they had been damaged by certain overt acts of the appellees, (2) they knew exactly what those acts were, (3) they believed that the acts which were causing damage had been performed pursuant to a conspiracy illegal under the Sherman Act.[28] The attempt to escape the releases reduces itself to the argument that they believed that the conspiracy had been formed in one year instead of in another. We have seen how spurious the argument is, relative to the statute of limitations. It is even more spurious relative to the releases. No matter when the conspiracy was formed, the damage resulted from the identical overt acts. *F. L. Mendez & Co. v. General Motors Corporation,* 161 F.2d 695, discussed pp. 48-50, supra, shows that it is immaterial whether the right to recover for damages arising from certain overt acts is based upon one statute or another or one conspiracy or another. In any event the cause of action is the same.

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[28]In addition to the quotation from the record at p. 46, supra, we note that in appellants' brief in the court below, at pages 4 and 33, it is said:

"Dr. Suckow knew that plenty of activities were directed against him by the defendants and that plenty was happening to him and his companies as a result of such activities."

Under the *Mendez* case, if appellants had previously sued these appellees alleging the same overt acts and the same damage, but asserting that the conspiracy had been formed in 1927, and if they had recovered judgment and been paid, they would have received full satisfaction for their claim and would not be entitled to recover again by alleging a different year as the time when the conspiracy was first formed. Conversely, had they brought such an action and lost it, that decision would have been *res judicata* and would have barred the second suit.

A fortiori, since they received satisfaction for their "damages" and gave a release therefor, that release conclusively bars them. The very essence of a release is that it acknowledges satisfaction for the damage claimed, and one may not have satisfaction twice (Cf. *Chetwood v. California National Bank,* 113 Cal. 414, 426). We may note, in this connection, that the releases not only covered actions, causes of action, claims, demands, controversies, etc., but also "damages." Since appellants knew at the time they gave the release of the very "damages" for which they now seek to recover, their release unquestionably covered those damages.

In *Momand v. Universal Film Exchanges,* 172 F.2d 37 (1 Cir.) (Dec. 1948), cer. den. 336 U.S. 967, plaintiff was held barred, by *res judicata,* from recovering under the Sherman Act for damages resulting from certain overt acts. He complained (p. 47) that

> "he was prevented from proving a new conspiracy not previously charged, a conspiracy to destroy the plaintiff's business. This is of a piece with the too generalized character of the plaintiff's proof. * * * But a conspiracy to destroy a business must take specific forms to achieve that end. Attention must be directed to the practices and conduct by which the defendants sought to accomplish their purpose. At no point does the plaintiff present, nor does the record reveal offers of evidence to show that anything beyond the twenty already familiar business practices is involved."

6. THERE IS NO ISSUE OF FACT CONCERNING THE RELEASES. THE SUIT WAS NOT ONE TO SET THEM ASIDE.

Appellants assert (Br. 82) that there are issues of fact. But the only two even suggested (Br. 83) are whether the releases covered "unknown" claims, and whether appellants would have given the releases "had they known of the 1929 conspiracy." We have just seen (pp. 53-57, supra), (1) that these questions are irrelevant in law, and (2) in any event, that the claim is sham in fact.

The cases cited by appellants are not in point. In *Raynale v. Yellow Cab Company,* 115 Cal. App. 90, the defendant obtained a general release for $25 within an hour and a quarter after the accident, plaintiff then still suffering from shock and believing the release to cover damage to her clothing but not the crushing of her hand. In *Jordan v. Guerra,* 23 Cal. 2d 469, plaintiff, a poor cotton picker, in consideration of $150, gave a release for the death of a child the day after the death, the release being obtained by an insurance adjuster who summoned the plaintiff from the funeral parlor for the purpose before plaintiff could obtain independent advice. One month later the release was rescinded for fraud.[29]

Moreover, appellants conceded below that this suit is not an action to set aside the releases. Thus counsel said at the oral argument below (R. 648-649):

> "There is no attempt to set aside the releases. * * * We do not attempt to set the releases aside in this particular proceeding. This is not an action for that purpose. * * * as I said, we are not attempting to set aside those releases."

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[29]In the other case cited by appellants, *Radio Corporation v. Raytheon Mfg. Co.,* 296 U.S. 459, the question was purely the procedural one of whether, in an action at law wherein the defendant pleaded a release and the plaintiff assailed its validity, the issue of validity was triable at law or in equity; the court expressly confined itself to the one question—the propriety of transferring the case to equity over plaintiff's objection.

Consequently, the releases remain and bar recovery, and all assertions about questions of fact seem pointless.

In the court below, after conceding that no attempt was being made to set aside the releases, appellants asserted that the releases constituted overt acts in the conspiracy. It is difficult to comprehend this contention. We pass an inquiry how appellants' act of giving a release could be an overt act of appellees, but submit that, if any idea at all is meant to be conveyed by the contention, it is that no claim asserted for damages for violation of the antitrust laws, and no antitrust litigation, could ever be settled because the very act of settlement would violate the antitrust laws. The very statement carries its own refutation.

Moreover, an "overt act" is not actionable unless it causes damage. A release of claims does not cause damage but merely acknowledges satisfaction of claims for alleged prior damage.

D. In Fact, No Claim for Relief is Stated Because What Appellants Seek to Do Is to Go Behind Final Judicial Decrees and Judgments.

According to the complaint, the acts of appellees which culminated to the damage of appellants in 1934 did so by resulting in judgments and orders which were rendered in favor of present appellees and against present appellants in actions or proceedings prosecuted or defended by them. Thus the alleged "pressures and activities" engaged in to force the Suckow company to sell and which caused it to lease (Compl. para. 83a, R. 53) consisted of:

1. **Suit of Borax Consolidated, Ltd. v. John K. Suckow, et al., No. C-107-M, filed March 29, 1930 in the U. S. District Court for the Southern District of California** (R. 53, 61). The court there fixed at $21.89 per ton the value of ore belonging to Borax Consolidated, Ltd. which had been wrongfully taken by its joint tenant John Suckow and the Suckow company. As a consequence of this court order, it is alleged, the Suckow company was

obliged to cease mining (R. 55). From this judgment the Suckows appealed to this Court, but the appeal was thereafter dismissed as a result of compromise of all differences (Compl. para. 83(g)(1), R. 61, 62). The dismissal of the appeal left the judgment in effect as if no appeal had ever been taken (*Wilson v. Aderhold,* 89 F.2d 903), and the judgment and its supporting findings became final (4 C.J.S., p. 2007, para. 1386).

2. Bankruptcy proceedings of the Suckow company alleged to have been instituted by Pacific Coast Borax Company and others associated with it (Compl. para. 83(c), R. 55) in which the Suckow company was adjudged a bankrupt March 2, 1933 (R. 58). The Suckow company appealed the adjudication of bankruptcy to this Court but dismissed its appeal (R. 58).

3. Lease by the Trustee in Bankruptcy of the property to Pacific Coast Borax Company "after court proceedings to such end" (Compl. para. 83(d), R. 59). The order of the Referee authorizing the lease was affirmed by the District Court, and the Suckow company appealed to this Court but dismissed the appeal (Compl. para. 83(e), R. 60). The propriety of the lease was thereby finally adjudicated.

4. Patent infringement suit in which a decree that the defendant Suckow company had infringed was rendered. The Suckow company appealed but dismissed the appeal (Compl. para. 83(b), R. 60, 61).

5. Judgment, in action No. C-107-H, against John Suckow for $56,601.48. Appeal was taken to this Court but was dismissed (Compl. para. 83(g)(1), R. 61, 62).

6. Proceedings in bankruptcy as a result of which it was determined that a certain rig, claimed by John Suckow, was property of the bankrupt and passed under the lease to Pacific Coast Borax Company. John Suckow petitioned the District Court for review of the Receiver's order but dismissed his petition (Compl. para. 83(g)(4), R. 62, 63), and that determination became final.

7. Judgment against John Suckow for $50,000 in a suit by the Trustee in Bankruptcy against him. Suckow appealed but dismissed his appeal (Compl. para. 83(g)(5), R. 63).

All these judgments, orders and determinations are final. The damages of which appellants complain were, if they existed at all, the result of these final judgments and orders of the courts, and, are therefore *damnum absque injuria.* Appellants may not go behind the judgments and orders and recover damages from appellees for the simple reason that the very rendition and finality of these judgments and orders is conclusive that they were legally correct, that the Suckows were legally in the wrong in the premises, and that whatever loss the Suckows have sustained from these actions they were subjected to lawfully. The court below could not be asked to relitigate those cases.

Chicago Pneumatic Tool Co. v. Hughes Tool Co., 61 F. Supp. 767 (1945), is directly in point. The defendant there had previously sued the plaintiffs in the United States District Court in Oklahoma for patent infringement, had obtained an injunction, and a Master was appointed to take an accounting; this was affirmed on appeal. Thereafter the defendant in the first case sued its adversary, the plaintiff in the first suit, in the District Court in Delaware alleging violation of the antitrust laws in the use of the patent, relying on recent United States Supreme Court decisions, and sought treble damages. The court sustained "defendant's motions challenging plaintiffs' right to maintain the present action" (p. 772). It held that it could not retry what the Oklahoma courts had adjudicated, and that it could not hold proceedings in the Oklahoma court to be in violation of the antitrust laws when the plaintiffs in that action had prevailed.

Conscious of their lack of a cause of action, appellants here sought to improve their case by alleging (R. 55) that in the action C-107-M the finding that the ore was worth $21.89 per

ton was obtained "by chicane and false testimony and by other devious means," that the adjudication of bankruptcy was obtained "through false and fraudulent testimony" (R. 58), and that the lease by the trustee to Pacific Coast Borax Company was obtained "by fraud and misrepresentation" (R. 60).

But the law will not permit such allegations to be made, for they constitute a collateral attack on the judgments.

Gerini v. Pacific Employers Insurance Co., 27 C.A.2d 52;
Gale v. Witt, 31 Cal.2d 362 (1948);
Taylor v. Bidwell, 65 Cal. 489;
Fidelity Storage Co. v. Urice, 12 F.2d 143 (affirming dismissal of a complaint on motion on the ground that allegations that a judgment was obtained by false, fraudulent and perjured testimony may not be heard).

The *Gerini* and *Gale* cases contain a full discussion of the rule, but we quote only a brief passage from the *Gerini* case:

> "To do so constitutes a collateral attack on the findings, which the law does not permit. * * * For this reason, an action at law for damages against an adversary party for allegedly procuring a judgment by fraud or perjury cannot be maintained while such judgment remains in force. * * * Allegations that defendant procured a patent to land by means of perjured testimony and intimidation of witnesses fails to state a cause of action for a declaration of trust. * * * Complaints proceeding upon the same theory as the present one and containing similar allegations have each been held to involve a collateral attack upon a judgment and therefore not to state a cause of action. * * * We conclude, therefore, that under the authorities cited, the trial court properly sustained the demurrers without leave to amend and entered judgments in favor of the defendants."

No different rules exist because the plaintiffs' charge is a violation of the antitrust laws. The rules of conclusiveness of judgments apply in those cases. *Chicago Pneumatic Tool Co. v. Hughes Tool Co.,* supra; *F. L. Mendez & Co. v. General*

Motors Corp., 161 F.2d 695 (7 Cir.); *Momand v. Universal Film Exchanges,* 72 F. Supp. 469 (see p. 473, paras. 5 and 6), affirmed *Momand v. Universal Film Exchanges,* 172 F.2d 37, 44-47 (Dec. 1948).

In *American Banana Company v. United Fruit Co.,* 166 Fed. 261, plaintiff sued for treble damages under the Sherman Act, claiming that Costa Rican officials, "instigated and induced by the defendant," had seized the plaintiff's properties and stopped its operations. The court dismissed the complaint as stating no cause of action, because the acts which caused the damage were the acts of the sovereign—Costa Rica—and because no one can be held liable for procuring a government to act (p. 266). The judgment was affirmed in *American Banana Company v. United Fruit Company,* 213 U.S. 347 (per Mr. Justice Holmes) on the ground:

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. * * * It makes the persuasion lawful by its own act."

So here, the damage resulted from court judgments. If one may not go behind the acts of a sovereign performed through its executive, *a fortiori,* he can not go behind the acts of the sovereign performed through its courts.

In *Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156, the plaintiff sued under the Sherman Act for treble damages because the railroads had, in conspiracy, fixed rates; he was denied damages because the rates had been approved by the Interstate Commerce Commission. The Court (per Mr. Justice Brandeis) agreed that, if the railroads had fixed the rates by agreement and conspiracy, they were subject to criminal prosecution or to an equity suit by the government under the Sherman Act, even though the rates had been approved by the Commission. Nevertheless, the plaintiff could recover no damages

because the rates charged were no greater than the plaintiff was entitled to ask under the Interstate Commerce Act, the decision on that fact by the Interstate Commerce Commission being conclusive. As the Court said:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' *Injury implies violation of a legal right.*"

In *Maltz v. Sax,* et al., 134 F.2d 2 (7 Cir.), cer. den. 319 U.S. 772, this same principle was applied in dismissing a suit for damages from a conspiracy under the antitrust laws.

In the present case the various judgments and orders were the proximate cause of the injury to the Suckows of which they now complain, but those judgments and orders establish their own legality and conclusively establish that appellants here were not injured in a legal right.

II.

DISCUSSION RELATIVE TO EVENTS ALLEGED TO HAVE OCCURRED AFTER 1934 AND ENDING DECEMBER 1942

Just as there may be no recovery relative to the alleged acts occurring prior to the general settlement of 1934, there may be none relative to the alleged subsequent acts, and for similar reasons, (1) statute of limitations, (2) release, and (3) no damage.

A. Recapitulation of the Allegations Concerning the Period After 1934.

The Suckows were out of the borax business entirely after 1934, and any cause of action for being driven out accrued no later than 1934. The only interest thereafter existing was that of the Suckow company as lessor of an undivided half interest in the jointly owned mineral property, leased for a 10-year term to the owner of the other half interest, appellee Pacific Coast Borax Company (see p. 8, supra).

In the eight years between 1934 and 1942, that appellee was on the premises mining the property under the lease. Having

received in the 1934 settlement the equivalent of $600,000 (see pp. 55, 56, supra), appellants again began to assert claims and make accusations.

Consequently, in December 1942, two years before the lease would expire, appellee bought, and the Suckow company sold, its interest and gave another complete release, and the Suckow Company was paid another $350,000, thus receiving a total of close to $1,000,000.

The present suit was an attempt to reopen matters for a third time.

As we have seen (p. 9, supra), only three overt acts are alleged to have occurred after 1934, (1) cave-ins of the mine, occurring principally in 1937, (2) use of shafts and tunnels, and (3) the sale of the reversion in 1942.[30]

We now turn to a consideration of these events.

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[30]The only other allegations are that between the latter part of 1939 and December 1942, appellees sought to persuade the Suckow company to agree to a new lease or to sell its reversion, and to this end did the "other things" alleged (para. 88, R. 71). Among these things were (a) a threat to "totally exhaust the said property by mining all the ore for which it had prepaid royalty" under the existing lease (para. 88, R. 71), and (b) the assertion of a right in the lessee not to vacate possession of the premises when the lease expired (para. 88(c), R. 71, 72).

This last group of allegations may be dismissed with a brief comment. Efforts to persuade are not actionable; the specific acts must be appraised. Similarly, mere threats are not actionable, and a cause of action could arise only if the threatened act was done and then only if there was no right to do it. Here, as the complaint shows, the threatened acts were not done since the sale occurred first. Moreover, it would not have been wrongful for the lessee to exhaust the ore "for which it had prepaid royalty," for the simple reason that it had prepaid the royalty and thus owned the ore. So also it would not have been wrongful to remain in possession at the end of the lease, because appellee was the owner of an undivided one half interest in the mine, as well as lessee of the other half interest. It is elementary law in California that each tenant in common is entitled to possession of the property. *Dabney-Johnston Oil Corp. v. Walden,* 4 C.2d 637, 655, 656; *Zaslow v. Kroenert,* 29 C.2d 541, 548. Indeed, the lease itself provided that on its termination the lessee could continue in joint possession of the mine with its co-tenant (R. 340).

B. If Any Claims for Relief Ever Accrued, They Too Have Been Barred by the Statute of Limitations.

The sale of 1942, the very last act alleged in the complaint, occurred nearly 5 years before suit was instituted. Under the principles already discussed (pp. 33, 34, supra) any claim on account of it or of any act preceding it is barred by the statute of limitations.

Appellants seek to avoid the effect of the statute by the argument (Br. 61-63) that the running of the statute was tolled until June 30, 1945 by the so-called Moratorium Act of October 10, 1942 as amended in 1945.

Even if that Act had any application to private suits, it still would avail appellants nothing as to the damages resulting from the cave-in, for the cave-in occurred in 1937. By the time of the 1942 sale more than three years had elapsed, and any claim on account of it was already barred by the statute of limitations. Even if the Moratorium Act applied, appellants are barred by the statute of limitations from recovering damages for any overt act occurring prior to December, 1940.

Moreover, the Moratorium Act applied only to proceedings by the government and did not apply to private actions. This subject is fully discussed at pages 17-27 of the brief being filed herein by appellee American Potash & Chemical Corporation. To avoid duplication we adopt that discussion. And we proceed to show that, quite apart from the statute of limitations, there were no claims for relief.

C. Any Claims That May Have Existed Were Released.

We have described the 1942 release at p. 32, supra. It released, by name, Pacific Coast Borax Company, Borax Consolidated, Ltd., "their stockholders, directors, officers, agents, servants, employees, attorneys in fact and attorneys at law" (R. 413). And, for the reasons stated on p. 51, supra, relative to the 1934 releases, it released every other appellee.

The release was all-comprehensive. In describing the character of matters covered, it used the same language as did the 1934 releases (see pp. 52, 54, supra, and R. 413 and 416), as well as other language which we shall mention.

Patently, the transaction of December 1942 was a complete settlement of all controversies and claims between the parties. Once more the slate between them was wiped clean.

Appellants' brief does not tender any argument that even rises to the dignity of a serious reply on the subject of release. Such arguments as are made we have answered in our discussion of the 1934 releases at pages 52-59, supra. If further demonstration were necessary that the 1942 release wiped out any and all claims, it is furnished by comparing with the release the overt acts alleged to have occurred after the slate had been wiped clean by the releases of 1934. We listed these overt acts on pp. 9, 65, supra, and take them up in the same order.

1. **Cave-ins.** Appellants knew of the cave-ins when they occurred; they made a claim against Pacific Coast Borax Company for the damages resulting and expressly released any claims pertaining thereto. In addition to the all-comprehensive language referred to above, the December 1942 release expressly provides (R. 414):

> "Without limiting the generality of the foregoing release, the undersigned does * * * release * * * [the parties already referred to] of and from any and all causes of action, * * * whether or not well founded in fact or in law, for or on account of any injury or damage to the mine in that certain real property described as Parcel 1 in lease of September 17, 1934, * * * and of and from any and all claims * * * growing or claimed to have grown out of or to have been proximately caused **by the caving of the mine** in the said Parcel 1 and of and from any liability for the results or consequences thereof, past or future, * * * together with any and all claims heretofore made or which might have been made on account of anything done, omitted or suffered or alleged to

have been done, omitted or suffered by the lessee with respect to the terms of the said lease * * *, including claims now unknown to the undersigned as well as known claims; and the undersigned does specifically agree that the said Pacific Coast Borax Company, as lessee of said lease, has performed all of the obligations thereof on its part to be performed, * * *"

2. Use of shafts and tunnels. Appellants knew of the use of the shafts and tunnels at the time the use occurred, for it is alleged that they protested (R. 71). And the December 1942 release, in addition to its all-comprehensive language, expressly covered (R. 415, 416)

"any and all causes of action, claims and demands, whether or not well founded in fact or in law, for or on account of **the use of the passageways, shaft and other facilities** of the mine in said Parcel 1 of said lease for the transportation and lifting of ore mined in premises of Borax Consolidated, Ltd., adjoining the said Parcel 1 and for any other act of commission or omission in or pertaining to the use or occupation of the said leased premises."

3. Sale. Any claims arising from the sale were also released. The release went into escrow together with the deed and bill of sale, i.e., the release, agreements of sale and conveyances were all part of the same transaction. The escrow instructions, which the stockholders ratified and approved (R. 423-425), directed payment to the Suckow company of cash and notes for $350,000 transmitted by the buyer "provided you [the escrow holder] have received * * * for delivery to buyer through this escrow," a grant deed, a bill of sale (R. 427) and "General release of all claims of seller against buyer and said Borax Consolidated, Ltd., their and each of their officers, agents, servants, employees and representatives" (para. (d), R. 427, 429). The release subsequently delivered to the buyer (R. 413) was identical with the form specified in the escrow instructions (R. 436).

The release extended to all claims which might arise at or before its delivery. It stated (R. 416):

> "It is the specific intent and purpose hereof to release and discharge any and all claims, demands and causes of action of any kind or nature whatsoever, whether known or unknown and whether specifically mentioned herein or not, which may exist or which might be claimed to exist at or prior to delivery hereof. * * *."

The deed (R. 418) was delivered on or before December 29, 1942, being recorded in the office of the Recorder of Kern County on that day (R. 421). The release was subsequently delivered by the title company to the buyer, Pacific Coast Borax Company, on January 2, 1943 (R. 421, 422).

Thus the release covered any claims that might have arisen from the sale and conveyance, which were consummated before the delivery of the release.

The complaint alleges (para. 88(e), R. 73) that the sale occurred because by December 1942 the Suckow company was discouraged

> "and *due to the past experience of plaintiffs with said defendants* and their manner of operating said mining property *and their many other persecutions* of plaintiffs, and the threats not to surrender the property to said SBM on the expiration of said lease, and due, among other things, to the fact that all of the former customers of said SBM in England and Holland had been taken over by defendants and many of the refineries on the European Continent using raw or calcined ore had discontinued their operations for lack of such ore, and the further fact that all of the former European markets of said SBM had been lost through the activities of defendants, or some of them, said plaintiffs consented that said SBM sell * * *."

Everything here referred to was, of course, known and in the mind of the Suckow company when it and its stockholders decided in December 1942 to sell and to give the general re-

lease. "Past experience" and "persecutions" referred to in the allegation involved and comprehended all the occurrences prior to 1934 with respect to which appellants had repeatedly charged appellees with conspiracy and violation of the antitrust laws.

D. No Claim for Relief Is Stated.

In this section we confine our discussion largely to a consideration of the claim relative to the 1942 sale of the Suckow company's reversionary interest.

Little need be said of the claim that the lessee made use of the shafts and tunnels upon the property to remove ore from its wholly owned adjoining property. As we have seen (e.g., pp. 6, 24, supra, and see discussion, p. 74, infra), the Suckow company owned only an undivided one-half interest in the mine, and Pacific Coast Borax Company was not only the lessee of that one-half interest, but it owned the other one-half. Every cotenant in California has equal right to possession and use of the property. *Dabney-Johnston Oil Corp. v. Walden,* 4 C.2d 637, 655, 657; *Zaslow v. Kroenert,* 29 C.2d 541, 545, 548. Consequently, appellee had a legal right to use the shafts and tunnels.[31]

Furthermore, the controversy over the right to the use of the shafts and tunnels was settled, and appellant's claims, if any, were explicitly released (see p. 68, supra). Similarly, we shall not discuss the cave-in, for any claim relative to it (1) had already, by 1942, been barred by the statute of limitations, and (2) was also explicitly released. Since appellant has already received full satisfaction for the cave-in and the use of shafts and tunnels, acknowledged by the release explicitly, it may not

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[31]Moreover, the right conferred by the antitrust laws on a private party is to recover for injuries to "his business or property" (Title 15, U.S.C. Sec. 15). And use by appellee and lessee of shafts and tunnels as a passageway, at a time when appellant itself was making no use thereof and could not do so (since it had leased its interest), could not conceivably have injured the appellant. Whatever claims appellant may have had as a consequence, they were not claims under the antitrust laws.

recover for them again by the device of alleging that they were committed as part of a conspiracy. As stated in *Momand v. Universal Film Exchanges,* 172 F.2d 37, cer. den. 336 U.S. 967 (May 2, 1949), an antitrust suit wherein plaintiff was held barred from recovery as to certain overt acts (there by reason of *res adjudicata*), "damage from these sources is therefore not open to proof in this case * * *" (p. 42) and see discussion at pages 48, 50, 56, 57, supra.

Although claims arising from the sale were also released and, as we submit, barred by the statute of limitations, we may readily show that no cause of action relative to it was alleged.

1. THE GOVERNING LEGAL PRINCIPLES.

No cause of action for private recovery under the antitrust laws is stated unless facts showing damage are affirmatively alleged. It is not enough to allege conduct forbidden by the Sherman Act. A defendant's conduct may subject him to criminal penalties or other proceedings at the hands of the government, but unless damage to a particular plaintiff has resulted from that conduct, the latter has no cause of action. General allegations are insufficient. The complaint must set forth facts from which damages are logically and legally inferable, and it must do so with definiteness. *Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156, 165 (judgment on demurrer); *Turner Glass Corporation v. Hartford Empire Co.,* 173 F.2d 49 (7 Cir.) (March 1949); *Beegle v. Thomson,* 138 F.2d 875, 881 (7 Cir.); *Glenn Coal Company v. Dickinson Fuel Co.,* 72 F.2d 885 (4 Cir.).

These rules have been applied in a number of treble damage suits commenced on the basis of the Supreme Court's affirmance of conviction in *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150. In those cases plaintiff jobbers paid a higher price for gasoline because of the conspiracy, but they did not plead or prove that their margin of profit on resale was lessened by failure to pass the price increases on to the consumer. They

were therefore denied recovery. E.g., summary judgments in *Clark Oil Co. v. Phillips Petroleum Co.,* 148 F.2d 580 (8 Cir.), cer. den. 326 U.S. 734, and *Leonard v. Socony Vacuum Oil Co.,* 42 F. Supp. 369, 370.[32]

Where a buyer of goods or services recovers damages under the antitrust laws, he does so because he has paid more than the "just and fair market price of the goods," and in his complaint he alleges the difference "between the just and fair market price of the goods and the price actually paid," and the "damages claimed are laid at this difference." Cf. *City of Atlanta v. Chattanooga Foundry & Pipe Co.,* 101 Fed. 900, 901. As stated in the opinion of the Supreme Court affirming this decision (203 U.S. 390 at 396), plaintiff recovers because he has paid "more than the worth of the [article]." Or as stated in *Thomsen v. Cayser,* 243 U.S. 66, 88, he alleges "a charge over a reasonable rate and the amount of it." He must allege damages in an amount susceptible of expression in figures. *Keogh v. Chicago & Northwestern Ry. Co.,* supra, at 165. Necessarily, then, if he pays no more than the worth of the goods or services purchased, he may not recover damages regardless of what conduct illegal under the law may be pleaded or even proved. It is so held in *Alden-Rochelle Inc. v. American Society of Composers, Etc.,* 80 F. Supp. 888. There, plaintiffs purchased performing rights under copyrighted material from an illegal monopoly but were denied any damages, the court pointing out that "what they got * * * had some value. * * * Plaintiffs can not recover unless they were led to pay 'more than the worth' of the performing rights." (897)

The converse is, of course, equally true. That is, one who sells rather than buys cannot recover where he receives for what he

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[32]Also *Northwestern Oil Co. v. Socony Vacuum Oil Co.,* 138 F.2d 967 (7 Cir.), cer. den. 321 U.S. 792 (directed verdict); *Twin Ports Oil Co. v. Pure Oil Co.,* 119 F.2d 747 (8 Cir.), cer. den. 314 U.S. 644 (directed verdict); *Twin Ports Oil Co. v. Pure Oil Co.,* 46 F. Supp. 149, 152.

sells the fair value, and he states no cause of action where he alleges no facts showing that he did not do so.

2. APPLICATION OF THESE RULES TO THE PARTICULAR CASE.

In selling its reversion in a one-half interest in the jointly owned property the Suckow company received $350,000. It was not alleged that this was not the full or fair value of what was sold, and, on the contrary, what was alleged demonstrated that no such allegation could be made.

Appellants' argument (Br. p. 51) that the trial court made a finding of fact that the price paid was not an inadequate consideration misstates the situation. The point is that the complaint simply tendered no issue on the subject. This was not a case of a complaint merely lacking necessary allegations. Here the affirmative allegations of the complaint showed that there was no damage, and the fact is confirmed by the uncontradicted documents.

The lease provided that the lessee, appellee Pacific Coast Borax Company, had the right to extract the ore during the term of the lease "without maximum limit * * * subject only to payment of the rentals or royalties" specified (R. 66, 67; Lease, R. 339). At the time of the sale the ten-year lease still had nearly two years to go (R. 67; 334).

Appellee Borax Consolidated, Ltd., the parent of the lessee (R. 6), was already half owner of the property, in co-tenancy with the Suckow company (see p. 8, supra, and cf. R. 54), the latter owning "but half the ore" (R. 339), and the lease covered only the half interest belonging to the Suckow company (R. 332). Thus the lessee was obligated only to pay royalties for one half of all ore extracted (Compl. R. 67; Lease, R. 339).

Moreover, prior to 1934 the Suckow company had removed over 32,000 tons of ore from this jointly owned property but had failed to account to its co-tenant for any part. This failure was one of the bases of suit No. C-107-H, instituted by the co-tenant, appellee Borax Consolidated, Ltd. (see pp. 7, 59, supra), and the claim resulting from the failure to account was

also asserted in the Suckow bankruptcy. As part of the Agreement of General Settlement of August 1934, it was agreed that Borax Consolidated, Ltd. would dismiss its suit against the Suckow company and waive the judgment against John Suckow (for these facts see digest of the complaint and agreement at p. 2 of the appendix to this brief). In consideration thereof, the ten-year lease provided that the lessee could remove a like tonnage of ore without paying any royalty whatever (so alleged in Complaint, R. 66, 67, and see Lease, R. 331, 338).

Furthermore, under the lease the lessee had to pay certain minimum monthly royalties whether or not it extracted ore (R. 342), but such minimum payments made in months of non-operation constituted prepayment on ore subsequently extracted (R. 344).

In 1942 the amount of ore left in the mine and still accessible after the cave-in of 1937 *was less than the tonnage which, under the lease, the lessee was entitled to extract without paying any royalty.* The complaint so alleges. In paragraph 86 (R. 69) it is alleged that "ore represented by prepaid royalties accrued to said lessee." In the next paragraph (R. 70) the cave-in of 1937 is alleged, and in the very next paragraph (para. 88(a)) (R. 71) it is averred that the lessee threatened that it would

> "totally exhaust the said property by mining all the ore for which it had prepaid royalty from the uncaved accessible part of said mine."

If there was any ore in the mine rendered inaccessible by the 1937 cave-in, the damage which the Suckow company sustained by its having been rendered inaccessible was explicitly covered by the release (see p. 67, supra), as well as barred by the statute of limitations long before the sale occurred. But so far as accessible ore was concerned, there was none left in the mine except what the lessee already had a right to take without payment, i.e., what appellee owned outright, because it had already bought and paid for it under the 1934 agreement. Such are the

allegations of the complaint, confirmed by the uncontradicted documents.

Behind appellees' rights to remove that accessible ore without payment the appellants may not go, for those rights came from the 1934 lease, and any claim to damage because of the lease was barred by the statute of limitations long before 1942. See *Momand* case, p. 34, supra.

Moreover, for still another reason appellants failed to allege a cause of action relative to the sale. The lessor was free to sell or not to sell, as it wished. It was under no compulsion to do so, certainly not at any price it felt was less than fair.[33]

In other words, the sale was voluntary. Its reasons for deciding to sell were, so it alleges, that it was "discouraged" (R. 74, and see quotation at p. 69, supra). But every overt act of appellees alleged to have contributed to that "discouragement" took place before the 1934 settlement or no later than the 1937 cave-in. For example, as we have seen (pp. 7 and 69, supra), it is affirmatively alleged that by the time of the 1934 settlement appellants had been "destroyed financially and left without means or opportunity further to engage in said borax business or any of its activities in any form whatsoever" and that appellants felt that they would not be successful in re-entering the borax business when the lease should expire in 1944 because their former customers and markets had been lost 10 years earlier.

As said in *Momand v. Universal Film Exchange,* 172 F.2d 37, 42, cer. den. 336 U.S. 967, if appellants, "without any specific damaging transaction," proceeded voluntarily to make business arrangements which caused damages, "they cannot charge it to

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[33]For example, appellants allege that appellees first sought to obtain not a sale but an extension of the lease on "more favorable" terms; yet after negotiations continuing "over a period of many months, during which said defendants endeavored in every way possible to force said SBM to the execution of a lease embodying terms of great disadvantage to said SBM," the lessor "refused to enter into any such lease" (R. 73). It was equally free to refuse to sell.

appellees." As for "any specific damaging transactions," any claim therefor had been released and, since they had occurred over 3 years before, had also been barred by the statute of limitations. Even if they had had some adverse effect on the price which appellant was able to receive on sale of its interest in 1942, they still fell within the principles stated in the *Momand* case, that the statute begins to run against each act when it occurs, barring recovery by plaintiff not only of damages for injury immediately suffered but also "for those he will suffer in the future from that particular invasion" (see quotation at p. 34, supra).

The sale created no new cause of action.

It is to these obvious truths that the District Court had reference when it pithily said (R. 620, and 81 F. Supp. 301, 305): "In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction."

III.

THE COURT BELOW DID NOT ERR IN REFUSING TO SET ASIDE THE JUDGMENT IN ORDER TO PERMIT APPELLANTS TO AMEND THE COMPLAINT A THIRD TIME.

After appellees' motions were granted and judgment entered (R. 621), appellants moved to "alter or amend the judgment" by vacating the dismissal and granting leave to amend the complaint. That motion in effect was one for a rehearing, since it sought to reopen the case. It was denied (R. 623). Appellant's contention that this was error (Br. 84) has no substance.

In *Laughlin v. Garnett,* 138 F.2d 931 (Ct. App. D.C.), on appeal from an order refusing plaintiff leave to file a third amendment to the complaint, the court held that justice does not require leave to be granted when one has already amended twice. In the present case appellants had already twice amended their complaint, and they had done so after being fully advised in detail of every one of appellees' objections. After the motions had been made and appellees' opening briefs below had been

filed, and on the second day of the oral argument, April 8, 1948, appellants filed a "First Amendment to the Complaint" (R. 80). Subsequently, on April 23, 1948, while the court was awaiting the closing brief, appellants filed and the court received a "Second Amendment to the Complaint"[34] (R. 82).

Whether a court, after granting a motion to dismiss, should grant leave to amend rests in its discretion and furnishes no ground for reversal. *Aetna Casualty & Surety Co. v. Abbott,* 130 F.2d 40, 44 (4 Cir.); *Ledbetter v. Farmers Bank & Trust Co.,* 142 F.2d 147, 149 (4 Cir.); *Young v. Garrett,* 159 F.2d 634 (8 Cir.). A refusal to permit amendment did not abuse that discretion in circumstances such as were present here.[35]

Moreover, when appellants moved to "alter or amend" the judgment, they did not submit to the court any proposed amendment or even disclose the nature of the amendment they proposed to make. This objection was raised in opposition to the motion, both orally and in writing. Yet appellants still made no effort to disclose what they proposed to allege. At no time have they done so, not even now. Failure to disclose the amendments one proposes to make itself requires denial of the motion. *Lilly v. U. S. Lines Co.,* 42 F. Supp. 214; *Schwab v. Nathan,* 8 F.R.D. 227. The rule is one universally applied, as a matter

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[34]In *Rogers v. Girard Trust Co.,* 159 F.2d 239, cited by appellant, plaintiff had never amended and still had a right to do so as of course. In the only other case cited by appellants, *Louisiana Farmers Protective Union v. Great A. & P. Co.,* 131 F.2d 419, the allegations in the original complaint were deemed by the appellate court to be sufficient. The complaint there alleged that defendants had monopolized all the strawberries in the United States and had lowered the price in order to eliminate plaintiff's assignors from business. The trial court refused to believe that these allegations could possibly be true. The appellate court held that the allegations, if true, constituted a cause of action, and that plaintiff had a right to try to prove them (pp. 423, 424). Damage to plaintiff's assignors was alleged, since it was averred that defendants had cut prices below cost and had thereby driven plaintiff's assignors out of business.

[35]Moreover, in exercising its discretion, the court could fairly take cognizance of the sham character of much of the complaint (see pages 42-45, 38-40, 11-30, supra) and of the sham nature of amendments already made (see p. 47, supra).

of common sense. Cf. *Hook v. Wren,* 44 C.A.2d 441; *Neher v. Kauffman,* 197 Cal. 674, 686; 21 *Cal. Jur.* 178, 179. A court does not abuse discretion in refusing to allow an amendment which would avail nothing if allowed. *Stephens v. Reed,* 121 F.2d 696 (3 Cir.). *A fortiori,* it does not do so when the proposed amendment is not disclosed.

There was, moreover, no merit or equity in the motion. The judgment of the court was not based on superficialities of pleading or absence of necessary allegations. It was addressed to fundamental objections. No allegation could possibly cure the bar of the statute of limitations. The admitted facts demonstrate that any allegation which appellants might seek to make for that purpose could only be sham. Similarly, all claims have been effectively released in a number of transactions for which appellants have received approximately $1,000,000. And the absence of a claim for relief is affirmatively shown by positive allegations of the complaint, not merely the result of absence of allegations.

IV.

SPECIAL CONSIDERATIONS PERTAINING TO APPELLEE BANK OF AMERICA AS EXECUTOR OF RASOR'S ESTATE

This appellee was sued in its capacity as executor of Rasor, who died May 21, 1946 (Comp., para. 15, R. 8). It believes the foregoing arguments to be all-sufficient, but, since it acts in a fiduciary capacity, it wishes to note, briefly, a consideration peculiar to it and which it will be unnecessary to review if the court affirms the judgment as to the other appellees, as we submit it should.[36]

Rasor was otherwise mentioned in the original complaint only twice, as an agent of Pacific Coast Borax Company in 1912 (para. 79, R. 42) and as an employee of United States Borax

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[36]This appellee also filed a motion to dismiss for lack of venue (R. 446). The court below did not pass on this motion, since it dismissed the case for other reasons, and we therefore do not discuss it.

Company in 1918 (para. 79, R. 48). The only charge of complicity in the alleged subsequently formed conspiracy was added by the bare allegation in the "First Amendment to the Complaint," filed during the oral argument, that "within one year subsequent to the formation of the alleged 1929 conspiracy" certain parties, including Rasor "agreed to and became parties to, said agreement" (R. 81). Whether this bare statement can suffice we do not consider, for there is still another defect never cured.

A suit for damages under the antitrust laws being a tort action (see p. 51, supra), early decisions held that such suits did not survive either (1) the death of the injured party, or (2) the death of the wrongdoer.[37]

The true rule of survivability being that tort actions do survive if the estate of the wrongdoer is enriched and that of the injured party is diminished, later cases held that a Sherman Act cause of action will survive the death *of the injured party* since his property or business has been damaged and therefore his estate has been diminished. *Hicks v. Bekins Moving & Storage Co.,* 87 F.2d 583 (9 Cir.); *Moore v. Backus,* 78 F.2d 571 (7 Cir.).

Whether such a cause of action will survive the death of *an alleged wrongdoer* is a different question. In the *Bekins* case this Court cited *United Copper Securities Company v. Amalgamated Copper Co.,* 232 Fed. 574 (C.C.A. 2), wherein it was held (headnote 8) that a Sherman Act cause of action would survive the death of the wrongdoer "in case he secured some benefit at the expense of the plaintiff," and *Moore v. Backus,* supra, agrees that the right to recover against the wrongdoer's estate depends, in effect, upon whether the estate had property derived from the wrong which it ought to return (78 F.2d at 575).

The issue here is not the broad question whether a Sherman Act claim may survive, but whether a particular claim survives

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[37]Cf. *Caillouet v. American Sugar Refining Co.,* 250 Fed. 639; *Bonvillain v. American Sugar Refining Co.,* 250 Fed. 641.

the death of a particular party. Rasor was merely a former employee of corporate defendants. As such his assets and his estate were not enriched by the alleged conspiracy. To hold that the estate of a mere employee is liable to suit under the antitrust laws without any allegation of enrichment of the estate would convert a private action for damages into a punitive instead of a remedial proceeding.

No attempt was made to allege any personal benefit to Rasor or enrichment of his estate even though the objection had been pointed out and the complaint thereafter amended relative to Rasor.

CONCLUSION

We respectfully submit that the judgment of the court below was correct and should be affirmed.

Dated: San Francisco, California
July 11, 1949.

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APPENDICES FOLLOW

APPENDIX 1

Digest of the Agreement of August 18, 1934

John Suckow and Ruth Suckow agreed:

1. To cause to be conveyed to Pacific Coast Borax Company or its nominee certain real property in Kern County. Quitclaim deeds thereto were also to be executed by John, Ruth, and the Mojave Borax Company (para. 1 of Agreement, R. 280-282). Moreover, they represented that the property in question was all the borate properties in which any of them had an interest (paras. 2 and 3, R. 282, 283).

2. To an order of the Bankruptcy Court confirming the 5-year lease theretofore made by the trustee to Pacific Coast Borax Company, being the very lease which shortly before they charged was being obtained in violation of the anti-trust laws, and waived all right to review the Referee's order authorizing it. They also agreed to a new 10-year lease (paras. 6(a) and (b), R. 284, 285). They agreed that the Suckow company should consent to the leases (para. 7, R. 287).

3. To give a general release "of any and all claims and causes of action of any kind and nature whatsoever, whether known or unknown, and existing or claimed to exist at or prior to the time of the close of said escrow" (para. 8(a), R. 287, 288).

4. To dismiss the appeal taken by John Suckow from the judgment entered against him in equity action No. C-107-H (para. 8(b), R. 288).

5. To dismiss with prejudice the complaint filed by John Suckow and Mojave Borax Company against Borax Consolidated, Ltd., No. 22868, in Kern County (para. 8(c), R. 288).

6. To dismiss the appeal from the decree adverse to them in the patent infringement suit (para. 8(d), R. 289).

In consideration of the foregoing, Borax Consolidated, Ltd. agreed:

1. To release all claims against John Suckow and the Suckow company arising from wrongful removal of ore from property jointly owned (Agreement, para. 11(a), R. 292). This claim amounted to over $310,000 (so alleged in complaint, R. 63) and arose from the taking by the Suckow company of over 16,000 long tons of ore (so recited, R. 330). As part of this release Borax Consolidated, Ltd. agreed to dismiss equity action No. C-107-H as against the Suckow company (para. 11(b), R. 293), and it agreed to dismiss its appeal to this Court from certain orders made in the Suckow bankruptcy proceeding which denied it an equitable lien [i.e., a secured and prior position] on the bankrupt's interest in the borate properties (para. 8(e), R. 289; R. 274, 275).

2. To give full satisfaction to John Suckow of the judgment for $56,601.48 rendered against him in said action C-107-H (para. 11(c), R. 293), and to dismiss with prejudice its action against Ruth Suckow, et al., No. 310-J, which had been brought to set aside fraudulent conveyances made by John Suckow to defeat that judgment (para. 8(h), R. 290).

3. To pay John Suckow and Ruth Suckow the sum of $150,000 cash (para. 10, R. 292).

4. To release the Suckows of all claims for damages and profits arising from the patent infringement in which an interlocutory decree of infringement had already been entered in favor of Borax Consolidated, Ltd. (para. 11(d), R. 293).

5. To give, together with Pacific Coast Borax Company and United States Borax Company, a general release to John Suckow (para. 11(f), R. 294).

6. To obtain from Gembo, the Dutch firm, release of claim of $140,000 which Gembo had filed against the Suckow company in the bankruptcy proceeding (para. 11(g), R. 294).

7. To give other considerations.

APPENDIX 2

Appellants' Counteraffidavits Raised No Issue of Fact

Appellants filed three counteraffidavits in opposition to the motion for summary judgment, one of appellant Tobeler (R. 466-520) and two of Mr. Buren, one of their attorneys (R. 570-572, 602-610).

Tobeler's affidavit, while long and with numerous alleged documents attached to it, is incompetent throughout. All of it is on information and belief, i.e., hearsay, and there is not a single document referred to or fact therein alleged to which Tobeler would have been competent to testify of his own knowledge.

As this Court has said in *Piantadosi v. Loew's, Inc.,* 137 F.2d 534, since *R.C.P.* Rule 56(e) provides that affidavits on a motion for summary judgment, including opposing affidavits, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein," any part of an affidavit not complying with this rule is disregarded.

Tobeler's affidavit was therefore incompetent, and this objection was promptly made at the hearing (see R. 645, 646, 649, 652, 662-666).

Beyond this, the vast bulk of allegations there made and of alleged documents attached had no relation to any issue bearing on the statute of limitations but constituted an attempt to prove by hearsay the merits of appellants' case, i.e., that there had been a conspiracy. One or two of the attached documents purported to be copies of court records (Cf. R. 642, 643), and, while incompetently offered, appellees agreed that they might be received. These, however, had to do with so-called "denials" by appellees of accusations by appellants, and we have already shown the irrelevance of that material (see pp. 44-45 of the body of this brief).

As for Mr. Buren, we have seen (pp. 20-25, 27, 28 of this brief) that during the years in question, acting as the Suckow company's secretary and attorney, he made repeated charges against the appellees of violation of the antitrust laws. The gist of one of his affidavits (R. 602-610) is that he did not know what he was talking about when he made these accusations and did not have sufficient competent evidence upon which the Suckows could have prevailed in a treble damage suit.[1]

In the *Burnham* case this Court (170 F.2d 569 at 573 and 574, fn. 4) quoted with approval the statement of the District Court, in granting the motion for summary judgment, that oral testimony by the Burnham company's president "that he had no knowledge or cause to believe, are opinions * * * and not proper evidence" and, further, that, even if it was evidence, nevertheless in view of writings by Burnham over the years making "continuous claim as to the responsibility of the defendants" "no mere lip service to the contrary can rise to the dignity of creating a factual conflict." The law does not permit a man to defer bringing suit until he has the legal evidence to prove his case. If he believes that he has been wronged, he may not defer suit until he has his proof "sewed up." Cf. *Lattin v. Gillette,* 95 Cal. 317. Being convinced or believing that he has a cause of action, he must sue before the statute of limitations has run and then make use of the available discovery procedures, such as taking depositions to require adverse parties to answer under oath and produce documents, demanding inspection of documents, and the like.[2]

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[1]Mr. Buren also presumes to say what he believes Suckow or others thought or believed, and he purports to state conversations participated in by Suckow at which affiant was not present.

[2]To the same effect: *Scafidi v. Western Loan & Building Company,* 72 C.A.2d 550, 570; *Fidelity & Casualty Co. of New York v. Jasper Furniture Co.,* 117 N.E. 258 (Ind.); *Texas Rice Land Co. v. McFaddin etc. Co.,* 265 S.W. 888, 890 (Tex.).

Mr. Buren's other affidavit (R. 570-572) merely quibbles that while the Suckows believed at the time of the accusations that appellees had acted in conspiracy, they believed that the conspiracy had been made at one date instead of at another. At pages 46-49 of the body of this brief we have shown how footless that argument is.